disabled persons who move to the territories."[26] A recent example of this same problem occurred in *United States v. Vaello Madero*.[27]

In *U.S. v. Vaello Madero*, the respondent received Supplement Security Income benefits while residing in New York; however, he lost his eligibility to receive these benefits by moving to Puerto Rico.[28] Despite loss of his eligibility, the government continued to provide the benefits until it found out that he resided in Puerto Rico; at which time, the government sought to sue the respondent to recover the monetary worth of those benefits.[29] In response, the respondent argued that excluding Puerto Rican residents from these benefits was unconstitutional.[30] The Court rejected this argument and found that the Constitution does not require Congress to extend Supplemental Security Income benefits to persons that reside in Puerto Rico; essentially, the Court reasoned that "Congress may distinguish the Territories from the States in tax and benefit programs such as Supplemental Security Income, so long as Congress has a rational basis for doing so."[31]

[26] Id.; See also Califano v. Gautier Torres, 435 U.S. 1, 1-2 (1978) (finding that "[c]ertain benefits under the Social Security Act, as amended in 1972, are payable only to residents of the United States, defined as the 50 States and the District of Columbia … One of the 1972 amendments to the Social Security Act created a uniform program, known as the Supplemental Security Income (SSI) program, for aid to qualified aged, blind, and disabled persons").
[27] See generally U.S. v. Vaello Madero, 142 S. Ct. 1539, 1541-44 (2022) (holding that, "[i]n light of the text of the Constitution, longstanding historical practice, and this Court's precedents," "the equal-protection component of the Fifth Amendment's Due Process Clause" does not require "Congress to make Supplemental Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States." The Court reasoned that "Congress need only have a rational basis for its tax and benefits programs" and "the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program." The Court further reasoned that "if this Court were to require identical treatment on the benefits side, residents of the States could presumably insist that federal taxes be imposed on residents of Puerto Rico and other Territories in the same way that those taxes are imposed on residents of the States." This, the Court reasoned, "would inflict significant new financial burdens on residents of Puerto Rico, with serious implications for the Puerto Rican people and the Puerto Rican economy." The Court then summarizes that "[t]he Constitution does not require that extreme outcome").
[28] Id. at 1542.
[29] Id.
[30] Id.
[31] Id. at 1542-43.

C. As residents of an unincorporated territory, persons residing in Puerto Rico have no constitutional or international law right to vote in U.S. presidential elections.[32]

Despite the court's acknowledgement of "the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States," the court provides that "Puerto Rico has no electors" and its residents may not participate in presidential voting unless "they take up residence in one of the 50 states."[33] The court further reasoned that the path to changing this "lies not through the courts but through the constitutional amending process" and that "the road to statehood—if that is what Puerto Ricans want—runs through Congress."[34] The Court elaborates on this notion by stating that "to resolve the asserted infirmity of having Puerto Ricans classed as citizens of the United States but unable to vote for President, [f]or example, Puerto Rico could be made a state or, alternatively, could be recognized as an independent nation."[35]

D. Due to their status as residents of an unincorporated territory, the people of Puerto Rico lose out on essential constitutional safeguards such as the Fifth Amendment right to presentment or indictment by a grand jury and the Sixth Amendment right to confront witnesses.[36]

Professor Ediberto Roman aptly describes, as follows, the devastating effect that often results from the differential treatment often provided to unincorporated territories, such as Puerto

[32] Serrano, supra note 10, at 412; See generally Igartua-De La Rosa v. U.S., 417 F.3d 145, 147-52 (1st Cir. 2005) (rejecting Puerto Rican residents' claims that their inability to vote for the U.S. president violated both constitutional rights and international obligations).
[33] Igartua-De La Rosa, 417 F.3d at 148.
[34] Id.
[35] Id. at 152.
[36] Ediberto Roman, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1, 12-13 (1998) (discussing how "several Supreme Court decisions [have] highlighted a difference in the constitutional safeguards available to the people of Puerto Rico").

Rico, that primarily derives from the questionable distinction created by the territorial incorporation doctrine:

> The Court in *Balzac v. Porto* [sic] *Rico*, held that the Sixth Amendment guarantee of a speedy and public trial, by an impartial jury in criminal prosecutions does not apply to the residents of Puerto Rico, unless such rights are made applicable by the local legislature. In *Ocampo v. United States*, the Court held that the Fifth Amendment right to presentment or indictment by a grand jury is inapplicable to the inhabitants of unincorporated territories. In *Dowdell v. United States*, the Court denied a criminal defendant in an unincorporated territory the Sixth Amendment right to confront witnesses. In *Dorr*, the Court held that the Sixth Amendment right to a jury trial was not a fundamental right as applied to the unincorporated territories. Finally, in *Balzac*, the Court reasoned that these rights were not fundamental rights, but procedural rights established by those societies of more sophisticated Anglo-Saxon origin.[37]

E. Threatening customary rights and creating harm in unincorporated territory residents' everyday experiences, the framework and aftermath of the Insular cases have created lasting and continuous negative consequences in the daily life of Puerto Rican, Phillipine, and other unincorporated territory residents alike.[38]

As evident from the non-comprehensive examples above, which perhaps only scratch the surface of the sweeping effects that have been had and continue to be had, "the *Insular Cases* have long-lasting detrimental impacts on the peoples of the U.S. territories"; essentially, "the *Insular Cases* reflect a discourse of exclusion and frame territorial peoples as perpetual 'foreigners,'

[37] Id.; See also Balzac, 258 U.S. 298 (discussed above); Ocampo v. U.S. 234 U.S. 91, 98 (1914) (finding that "Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the 5th Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force apply to the Islands"); Dowdell v. U.S., 221 U.S. 325, 332-33 (1911) (sustaining a Phillipine conviction that likely would have violated the defendant's Sixth Amendment rights had the Phillipines been an incorporated, rather than unincorporated, territory); Dorr v. U.S., 195 U.S. 138, 144-45 (quoting Justice Brown and stating that such rights "are not fundamental in their nature, but concern merely a method of procedure").
[38] Serrano, supra note 10, at 411-13.

'outsiders,' and 'others,' thereby facilitating their marginalization."[39] Likewise, for many in the territories, the inability to decide their own political fate is deeply subordinating."[40] Thereby, a question is propounded, does the Constitution really stand for this?

III. The Road to *Dobbs*: The Dismissal of Abortion Jurisprudence in The Face of *Stare Decisis*

With *Dobbs v. Jackson Women's Health Organization*, the jurisprudence on abortion appears to have come full circle.[41] "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[42] Then, "[o]n January 22, 1973, the Supreme Court of the United States issued its opinion in *Roe v. Wade*, and held that a woman has a fundamental right under the United States Constitution to decide whether to end her pregnancy."[43] Essentially, as Justice Alito provides in the majority opinion of *Dobbs*, "[e]ven though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one."[44] Under the trimester framework provided in *Roe*, "each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which at the time, corresponded to the point at which a fetus was thought to achieve 'viability,' *i.e.*, the ability to survive outside the womb."[45] Elaborating on the lack of explanation for the sudden framework and analysis provided in *Roe*, Justice Alito states "even abortion supporters have found it hard to defend *Roe*'s reasoning."[46]

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[39] Id. at 411.
[40] Id. at 412.
[41] See generally Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[42] Id. at 2240.
[43] Linda L. Schlueter, 40th Anniversary of Roe v. Wade: Reflections Past, Present, and Future, 40 Ohio N.U. L. Rev. 105, 107 (2013).
[44] Dobbs, 142 S. Ct. at 2240.
[45] Id. at 2241.
[46] Id.

The Court, in 1992, partially overruled *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* by displacing the trimester framework and substituting "a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an 'undue burden' on a woman's right to have an abortion."[47] Despite the plurality's failure to recognize the depth and new found difficulties this "constitutionally amorphous 'undue burden' standard would create, 'undue burden' generally remained the standard until *Dobbs*.[48] This standard required the Court to determine whether a proposed abortion-related regulation placed a substantial obstacle in the way of a woman's right to choose.[49]

Moreover, at the time, "the opinion [in *Casey*] concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before 'viability'—even if that holding was wrong."[50] The Court then steered away from the prior adherence to *stare decisis* in *Casey*, in its most recent seminal case on abortion, *Dobbs v. Jackson Women's Health Organization*.[51] In that case, the state of Mississippi asked the Court "to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb"; the state argued for the Court to entirely "overrule *Roe* and *Casey* and once again allow each State to

[47] Id. at 2242.
[48] Jeffrey A. Van Detta, Constitutionalizing Roe, Casey, and Carhart: A Due-Process Anti-Discrimination Principle To Give Constitutional Content To The "Undue Burden" Standard of Review Applied To Abortion Control Legislation, 10 So. Cal. Rev. L. & Women's Studies 211, 217, 286 (Spring 2011) (providing, in footnote 264, that "[t]he plurality erred in failing to recognize that the undue burden standard must do more than merely ask whether a particular statute places 'a substantial obstacle'—an incredibly malleable and difficult to use test—to the exercise of the rights of choice and of reproductive autonomy").
[49] Id. at 286; See also Planned Parenthood of Se. Pa.v. Casey, 505 U.S. 833, 888-99 (1992) (providing some vague guidelines for what constitutes a substantial obstacle such as to constitute an undue burden; the opinion, essentially, describes the following as a substantial obstacle: a spousal consent requirement, a spousal notice requirement, a total ban on pre-viability abortions, and a requirement for minors to get parental consent without judicial bypass).
[50] Dobbs, 142 S. Ct. at 2241.
[51] Id.

regulate abortion as its citizens wish."[52] The Court then gave them exactly that wish, returning the law largely to the state it was for the [f]irst 185 years after the adoption of the Constitution," in which each state is now permitted to address the issue "in accordance with the views of its citizens."[53] Thereby, the decision on whether and how to regulate abortion is now, essentially, left up to each state and is reviewed under rational basis review, as opposed to the previously more stringent, undue burden standard.[54]

IV. The Erosion of *Stare Decisis*: Has The Court Knocked Down The Barriers to Overruling Discriminatory Precedent?

Generally, "[p]rinciples of *stare decisis* [have held] that subsequent decisions must give deference to prior rulings in the absence of a strong basis for a different ruling."[55] Proponents of adhering to this doctrine argue that "[*s*]*tare decisis* creates and fosters predictability in the meaning and application of the law" and that "[r]especting *stare decisis* means sticking to some wrong decisions."[56] However, *stare decisis* will not always create a bar to deviating from precedent; courts have repeatedly found that "[t]he law is not static, and *stare decisis* does not mandate that a rule of law once established may never change."[57] Although, for the rule of law to change, "a rule once adopted may be changed only by the court that adopted it, a higher court within the same jurisdiction or the United States Supreme Court."[58]

[52] Id.
[53] Id. at 2240-42.
[54] Id.
[55] C.J.S. Courts § 184 (2022) 1 Martin D. Carr & Anna Taylor Schwing, California Affirmative Defenses Expert Series § 14:62 (2d ed. 2022).
[56] Id.
[57] Id.
[58] Id.

Even nearly a century ago, Justice Brandeis acknowledged this in his dissent, stating that, although "[s]tare decisis is usually the wise policy," "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."[59] With its frequent overruling of important Constitutional precedent, the Court's "inconsistent" adherence to *stare decisis* has since warranted further criticism as "a doctrine of 'convenience'" in which, "when motivated," "the Supreme Court will overrule a prior decision of the Court, regardless of age, subject matter, or pragmatic consideration."[60] To do so, the Court has previously, and more recently, provided balancing tests "that weig[h] the expected costs and benefits of adhering to prior precedent," using the following factors: whether "(1) the older holding has proven practically unworkable; (2) there has been significant reliance on the older holding; (3) new legal developments have rendered the old law, in effect, no longer binding;" "(4) factual advancement has removed any justification the older holding had;" (5) "how old the precedent is;" (6) "the reliance interest at stake"; (7) "the reasonableness of the older decision"; and (8) "whether experience has revealed a precedent's shortcomings."[61] Furthermore, despite "the Court ha[ving], on many occasions, laid out the framework for deciding when *stare decisis* applies,

[59] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-08 (1932) (arguing that "[s]tare decisis is not, like the rule of res judicata, universal inexorable command" and elaborating that "[t]he rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible"); Cf. Lee Epstein, William M. Landes, & Adam Liptak, The Decision To Depart (Or Not) From Constitutional Precedent: An Empirical Study Of The Roberts Court, 90 N.Y.U. L. Rev. 1115, 1116-17 (Oct. 2015) (providing that Justice Brandeis's statement, although coming from a dissenting opinion, "now has the status of black letter law." The authors further provide that "[m]any leading political science and legal analyses of constitutional law quote it, generations of constitutional lawyers have rehearsed it, and the Justices regularly say they are more likely to depart from precedent in constitutional cases than in other types").

[60] William S. Consovoy, The Rehnquist Court And The End of Constitutional Stare Decisis: Casey, Dickerson, And The Consequences of Pragmatic Adjudication, 2002 Utah L. Rev. 53, 69-70 (2002) (reviewing the history of stare decisis and analyzing the Court's "use and misuse of the doctrine" through three seminal Supreme Court cases).

[61] Daniel M. Tracer, Stare Decisis In Antitrust: Continuity, Economics, And The Common Law Statute, 12 DePaul Bus. & Com. L.J. 1, 7-8 (Fall 2013) (providing that "the Court has recognized both in Casey as well as in subsequent decisions that stare decisis is not to be construed as an absolute command that the Court will always follow a prior rule" and describing the various balancing tests and re-formulations thereof that the Court has used to stray from its following of stare decisis).

this has not prevented numerous commentators from opining that the true *stare decisis* calculus is often unprincipled and rather mysterious."[62]

> Though *stare decisis* continues to hold its place in American jurisprudence, the rule has never been free of detractors. Perhaps just as famous as the notion of *stare decisis* itself is Judge Holmes' declaration that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.' Indeed, over a hundred and fifty years ago Alexis de Tocqueville criticized the common law tradition for its prioritizing reliance on decided cases over the 'constituent principles of the law.' Moreover, contemporary scholars have recognized that adherence to established legal decisions may sometimes prevent a judge from pursuing his or her arguably more basic function—to search for the truth in a matter—thus achieving efficiency only at the considerable expense of justice. In other words, *stare decisis* can sometimes require that formalistic insistence on established rules trumps a more equitable or mutually beneficial decision before the court.[63]

In sum, *stare decisis* may influence "how cases are argued, how opinions are written, and how Supreme Court decisions are received by lower courts, but [it] does not disturb the conclusion that the *stare decisis* norm has little effect on the Justice's actual votes."[64] Recently, in *Dobbs*, the United States Supreme Court has shown this through its particular inclination to change the rule of law it previously adopted, straying away from any conventional loyalty to the doctrine of *stare decisis*.[65] This deviance from *stare decisis* becomes strikingly evident as Justice Alito, in the

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[62] Id.; Cf. Planned Parenthood of Se. Pa, 505 U.S. at 854 (applying one such framework, stating that "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal rule of law, and to gauge the respective costs of reaffirming and overruling a prior case).

[63] Tracer, supra note 61, at 8-9 (arguing, further, that the unprincipled and mysterious nature of stare decisis led to its diminished role and providing that "stare decisis may be detrimental to the extent that it is antithetical to progress, by, at times, preserving oppressive traditions while preventing the law from keeping up with contemporary notions of liberty and equality." Tracer expounds that "stare decisis has been further critiqued on the basis of behavioral science notions that stare decisis reflects a cognitive bias in favor of the status quo, thereby possibly stunting meaningful analysis").

[64] Fredrick Schauer, Stare Decisis—Rhetoric And Reality In The Supreme Court, 2018 Sup. Ct. Rev. 121, 129 (2018) (finding that "stare decisis is a virtue … is far more often preached than practiced" as well as that "stare decisis has no weight when the constitutional law on a particular subject seems, to a majority of the Court to be in need of correction").

[65] Dobbs, 142 S. Ct. at 2261.

majority opinion, starts the heart of the Court's analysis with "as the Court has reiterated time and time, again, adherence to precedent is not an 'inexorable command.' There are occasions when past decisions should be overruled, and as we will explain, this is one of them."[66] Justice Alito continues to elaborate that *stare decisis* "is at its weakest when we interpret the Constitution" and that "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake."[67] Demonstrating the importance of being able to overrule past constitutional decisions, Alito further provides that "[a]n erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances, we must be willing to reconsider and, if necessary, overrule constitutional decisions."[68] The Court then demonstrates that it, time and time again, has been willing to overrule its past constitutional decisions, even providing a footnote displaying over thirty examples of when it has done so in the past.[69] Justice Alito further bolsters the Court's argument, stating that "[n]o Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision."[70] "Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country."[71]

The Court then lays out a new framework, based largely upon the previous frameworks provided by *Janus v. State, County, and Municipal Employees*, as well as *Ramos v. Louisiana*, that contains five factors to help decide when precedent should be overruled.[72] Using these five factors to the Court's advantage, the Court overrules and changes the legal landscape of nearly 50 years

[66] Id.
[67] Id. at 2262.
[68] Id.
[69] Id. at 2263 (footnote 48 providing a non-exclusive, yet expansive list, of cases and principles that have be overruled, despite the Court's alleged adherence to the doctrine of stare decisis).
[70] Id. at 2264.
[71] Id. at 2263-64.
[72] Id. at 2264.

of abortion jurisprudence, squarely in the face of *stare decisis*.[73] This treatment of the doctrine, seemingly demonstrates that the Court has done away with its traditional reverence for *stare decisis* and, more or less, created a soft multi-factor-balancing test for whether and when the Court will adhere to precedent; although perhaps a stark contrast from its previous dealings with case precedent, this may create a novel argument for finally turning over a set of disfavored constitutional decisions, the *Insular Cases*.[74]

V. The *Dobbs* Factors Militate in Favor of Overruling The *Insular Cases*

[73] Id. at 2265-84; See also Janus v. Am. Fed. of State, Cnty., and Mun. Emp., 138 S. Ct. 2448, 2478-79 (2018) (looking to past Supreme Court cases and finding five factors that counsel against adhering to stare decisis and counsel towards overturning prior decisions; these five factors are set forth as follows: "the quality of the [case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision"); Cf. Ramos v. La., 140 S. Ct. 1390 (2020) (J. Kavanaugh concurring in part and, after citing to thirty "of the Court's most notable and consequential decisions hav[ing] entailed overruling precedent," stating the following seven factors identified by the Supreme Court in overruling past cases: "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent").

[74] Id. (generally, a soft-multi-factor balancing test takes into account of non-exclusive factors that are often, more or less, equally weighted and where no particular factor is dispositive of the issue, such as the Forum Non Conveniens doctrine, discussed in Gulf Oil Corp., 330 U.S. 501, 508-09 (1947) which weighs a series of public and private interest factors, with none of them being dispositive, in its determination of whether to transfer the case to a more convenient forum); See also Gulf Oil Corp., 330 U.S. at 512 (Justice Black criticizing such tests in his dissent, stating "[t]he broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible"); See Generally The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction To Reconceptualize Metaphorically A Substance-Procedure Dissonance Exemplified By Forum Non Conveniens Dismissals In International Product Injury Cases, 87 Marquette L. Rev. 425, 431-32 (2004) (discussing Justice Black's Gulf Oil dissent and the issue with the Forum Non Conveniens doctrine; moreover, referring generally to Gary B. Born & David Westin, International Civil Litigation in United States Courts 289-92 (Kluwer 2d ed. 1992) as an informative source that "illustrat[es] the typically conclusory 'application' of these factors to justify a particular result"); Cf. Justice Restored: Using A Preservation-Of-Court Access Approach To Replace Forum Non Conveniens In Five International Product-Injury Cases, 28 Northwestern J. of Int'l L. & Bus. 53, 58-60 (Fall 2003) (also discussing Justice Black's Gulf Oil dissent and the overarching issue with the Forum Non Conveniens soft multi-factor-balancing test); Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. and Placement et al., 326 U.S. 310, 323 (1945) (Justice Black dissenting, criticizing soft-multi-factor balancing tests and finding that the "uncertain elements" introduced by the Court "confus[e] the simple pattern and ten[d] to curtail the exercise of State powers to an extent not justified by the Constitution"); See generally Jeffrey A. Van Detta & Shiv K. Kapoor, Extraterritorial Personal Jurisdiction For The Twenty-First Century: A Case Study Reconceptualizing The Typical Long-Arm Statute To Codify And Refine International Shoe After Its First 60 Years, 3 Seten Hall Circuit Review 339 (2007) (discussing Justice Black's criticism of International Shoe).

A. In light of the far-reaching and damaging effects of the *Insular Cases*, the nature of the Court's error demonstrates a profound need for the cases to be re-visited and overruled.

Like in *Dobbs*, where the "five factors weigh[ed] strongly in favor of overruling *Roe* and *Casey*," these five factors could and should be used to overrule the *Insular Cases*; as previously listed, the five factors are as follows: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[75] Beginning with the first factor, "the nature of the Court's error," the Court states that "[a]n erroneous interpretation of the Constitution is always important, but some are more damaging than others."[76] Comparing *Roe* to *Plessy v. Ferguson*, Justice Alito finds *Roe* was also "'egregiously wrong' on the day it was decided"; he finds this, in large part, because "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."[77]

Likewise, the reliance on incorporated versus unincorporated territories is "outside the bounds of any reasonable interpretation" of the Territories Clause or any other provision pointed to.[78] The Territories Clause, in full, states that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[79] Nowhere in that Clause, or the Constitution in general,

[75] Id. at 2265.
[76] Id.
[77] Id.
[78] Id.
[79] U.S. Const. art. IV, § 3, cl. 2.

does it appear to explicitly or implicitly, mention anything about a differentiation between an incorporated and an unincorporated territory.[80]

Moreover, like *Roe* and *Casey*, whose alleged "errors do not concern some arcane corner of the law of little importance to the American People," the "errors" associated with the *Insular Cases* and the Territorial Incorporation Doctrine create "question[s] of profound moral and social importance."[81] Perhaps stated best by Puerto Rican jurist and former Chief Judge of the United States District Court for the District of Puerto Rico, Juan R. Torruella argues that the *Insular Cases* "contravened established doctrine that, as based on sound constitutional principles, substitut[ed] binding jurisprudence with theories that were unsupported in our traditions or system of government and which were specifically created to meet the political and racial agendas of the times."[82] He elaborates that "the basis on which they were premised—that the United States could hold territories and their inhabitants in a colonial status indefinitely—was unprecedented in our history and unauthorized by our Constitution."[83] Furthermore, he expounds that "the continued vitality of these cases represents a constitutional antediluvian anachronism that has created a de jure and de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories."[84] A political apartheid in which, solely because of its status as an unincorporated territory, persons who live in the territories generally cannot vote in U.S. presidential elections, have no voting representatives in Congress, do not have the right to demand a trial by jury, may lose their Supplemental Security Income benefit payments, and, in addition to other far-reaching consequences, essentially have revokable, second-class citizenship.[85] "As the

[80] Id.
[81] Dobbs, 142 S. Ct. at 2265.
[82] Torruella, supra note 8, at 346.
[83] Id.
[84] Id. at 347.
[85] See generally Serano, supra note 10, at 409-14.

Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process."[86] If the nature of such an error favored overruling the precedent at hand, does it not naturally follow that removing people from the democratic process altogether, such as by taking away the ability to vote, also militates in favor of overruling precedent?[87]

B. Founded in racist and imperialist notions, the quality of the Court's reasoning, in concocting an elaborate distinction between incorporated and nonincorporated territorial lands, supports overturning the cases to prevent reliance on discriminatory and ungrounded precedent.

Following the Court's analysis on the "nature of Court's error," the Court then addresses "the quality of the reasoning" as a factor favoring overturning prior jurisprudence.[88] One thing, in particular, that the Court looks at, under this factor, is whether the precedent "stood on exceptionally weak grounds."[89] Essentially, these "exceptionally weak grounds" appear to be found by the Court when the precedent lacks "firm grounding in constitutional text, history, or precedent" and these weak grounds can be shown, to an extent, by the Court having not defended or preserved the reasoning of that precedent in future cases.[90] Like the lack of defense or preservation of *Roe* in *Casey*, "defenders do not attempt to defend [the] actual reasoning" of the

[86] Dobbs, 142 S. Ct. at 2265; See generally W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)); Cf. Jason D. Ray, Judicially Imposed Limits on the Sanction Authority of Texas Agencies, 2016 TXCLE Advanced Admin. L. 6.II (2016) (providing that West Coast Hotel v. Parrish "signaled an end to the Lochner era"); Cf. 1 Tex. A&M L. Rev. 129, 143 (Fall 2013) (providing in footnote 79 that "[t]he Court in West Coast Hotel upheld the state of Washington's law providing for a minimum wage to women, even though the Court had struck down a nearly identical law in Adkins v. Children's Hospital, 261 U.S. 525 (1923). The year 1937 is widely recognized as the date when the Lochner era ended and substantive due process no longer recognized property and contract rights as fundamental in nature").
[87] Id.
[88] Id. at 2265-72.
[89] Id. at 2266.
[90] Id. at 2266-71.

Insular Cases and territorial incorporation.[91] Further, the quality of the reasoning of "the territorial incorporation doctrine could doubtfully 'withstand careful analysis' because it is clearly at odds with other enduring precedent, fails to consider 'authorities pointing in an opposite direction,' and—perhaps most critically—discriminates against and demeans the residents of the U.S. territories."[92]

Looking back at Justice Alito's analysis of *Roe*, in the same vein, he found that *Roe* "relied on an erroneous historical narrative," devoting "great attention to and presumably rel[ying] on matters that have no bearing on the meaning of the Constitution."[93] "It concocted an elaborate set or rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source."[94] Similarly here, with the *Insular Cases*, the Court concocted an elaborate distinction between incorporated and unincorporated lands, a distinction "found nowhere in the constitutional text." Analogously to Justice Alito's argument against elaborate concoctions, one may argue that "[i]nterpretative canons should have then—as they should now—disfavor a judicially-created, novel, and atextual gloss on Congress' territorial power," i.e., an elaborate concoction of rules with seemingly no "firm grounding in constitutional text, history, or precedent."[95]

> The distinction between different kinds of territories also lacked historical precedent: Members of the Supreme Court only made the doctrinal leap to 'incorporation' in the 1901 *Insular Cases*. Justices who dissented from those *Insular Cases* pointedly and correctly cited cases '[f]rom *Marbury v. Madison* to the present day,' establishing that constitutional limits to Congress' power applied with full force in the territories. Congress, after all, Justice Harlan stressed in his

[91] Derieux & Alomar, supra note 1, at 746.
[92] Id. at 747.
[93] Dobbs, 142 S. Ct. at 2266.
[94] Id.
[95] Derieux & Alomar, supra note 1, at 748.

> *Downes* dissent, is a 'creature of the Constitution. It [lacks] powers … not granted, expressly or by necessary implication.' The *Insular Cases* upended that premise by proposing that undefined parts of the Constitution that constrained the national government's power could lay dormant or inapplicable in 'unincorporated' domestic territory until Congress decided otherwise. That the *Insular Cases* manufactured a then-unprecedented and controversial distinction between the two types of territories with no basis on the constitutional text is now well understood.[96]

Being at odds with precedent thus "gravely undermines the respect owed territorial incorporation under *stare decisis*."[97] Such precedent also indicates that whereas Congress' authority over territories may be broad, it is not "unfettered"; it may not be "unfettered, even when Congress acts outside of places within its "sovereign control."[98] Accordingly, "the Court's statements have been consistently more in line with the *Insular Cases*' dissents than with their authoritative rulings."[99]

The quality of the reasoning of the *Insular Cases* is also faulty in its reliance on "discredited racialized concerns over adding millions of nonwhites—in other words, inhabitants of then newly-annexed lands like Puerto Rico" to the United States.[100] Even in the leading *Insular Case, Downes*, it "panned extending citizenship to people of an uncivilized race'" and endorsed "treatise passages suggesting that conquering people ought 'govern' 'fierce, savage, and restless people[s] 'with a tighter rein.'"[101] Likewise, in another seminal *Insular Case, De Lima v. Bidwell*, the Court "starkly warned against admitting 'savage tribes' into American Society."[102] With such racial and colonial

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[96] Id. at 749-50.
[97] Id.
[98] Id.
[99] Id. at 751.
[100] Id.
[101] Id.
[102] Id.; See also De Lima v. Bidwell 182 U.S. 1, 180, 219 (1901) (holding that the goods transported from Puerto Rico after Spain's cession of Puerto Rico to the U.S. were not transported from a foreign country for the purposes of U.S. tariff laws and that the U.S. could not collect customs duties through classification of Puerto Rico as a foreign county; the Court found that Puerto Rico no longer constituted a foreign country, reasoning that "[a] foreign country was defined by Mr. Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation,

concerns at the center of the reasoning of the *Insular Cases*, the cases' "purpose and reasoning are unavoidably 'disreputable to modern eyes.'"[103] Thereby, the racist, imperialist, and constitutionally and precedentially foundationless quality of the reasoning of the *Insular Cases* also militate in favor of overruling them.[104]

C. The unworkability of the Insular Cases militates in favor of them being overruled due to the ambiguity in their application, the inconsistency and unpredictability of what rights and protections may be afforded to citizens of unincorporated territories, and the ineffectual workarounds created by the Court.

The Court, in *Dobbs*, next analyzes the workability of precedent as yet another factor that decides whether a case or a line of cases should be overruled.[105] As the Court provides, "[o]ur precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[106] In that case, the Court elaborates as to when precedent is unworkable; the Court states, for instance, that "*Casey*'s 'undue burden' test has proved to be unworkable" because, "'[p]lucked from nowhere,' it 'seems calculated to perpetuate

and without the sovereignty of the United States." In addition to the primary reasoning propounded by the Court, it appears that it had alternative motives such as to avoid the nationalization of Puerto Rican peoples as can be seen here: "It is only true to say that counsel shrink somewhat from the consequences of their contention, or if 'shrink' be too strong an expression, deny that it can be carried to the nationalization of uncivilized tribes. Whether that limitation can be logically justified we are not called upon to say. There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary, or which could be applied or enforced by the judiciary. Upon what degree of civilization could civil and political rights be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial. Nor can those difficulties be put out of contemplation, under the assumption that the principles which we may declare will have no other consequence to affect duties upon a cargo of sugar. We need not, however, dwell on this part of the discussion. From our construction of the powers of the government and the treaty with Spain in danger of the of the nationalization of savage tribes cannot arise").

[103] Id. at 752.
[104] Id. at 751-52.
[105] Dobbs, 142 S. Ct. at 2272.
[106] Id.

give-it-a-try litigation' before judges [are] assigned an unwieldy and inappropriate task."[107] Determining whether there was an undue burden, defined as "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," was inherently difficult for judges, given the ambiguity of the word "substantial" and the general lack of standards for determining when a burden was "undue."[108] Thus, the Court found that the lack of workability of the undue burden test militated towards overruling *Casey* because "[c]ontinued adherence" "would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'"[109]

Moreover, "[l]ack of workability has been clear when, for example, precedent makes a distinction that 'prove[s] to be impossible to draw with precision,' has 'been questioned by Members of the Court in later decisions,' or 'defie[s] consistent application.'"[110] From the start of the *Insular Cases*, the unprecedented distinction between incorporated and unincorporated created much difficulty in determining what constitutional provisions, rights, and protections apply in what territories.[111] This, in turn, has led to continuous misapplication and misinterpretation of the *Insular Cases* and the associated territorial incorporation doctrine.[112]

Furthermore, one member of the Court, Justice Gorsuch, has recently thoroughly questioned the *Insular Cases* in his *Vaello Madero* concurrence, both in the quality of their reasoning and their workability as precedent.[113] Justice Gorsuch makes his disdain clear, stating at the very beginning of his concurrence: "[i]t is past time to acknowledge the gravity of [the Court's]

[107] Id. at 2275.
[108] Id. at 2272.
[109] Id. at 2275.
[110] Derieux & Alomar, supra note 1, at 756.
[111] Id. at 759.
[112] Id. at 756.
[113] Vaello Madero, 142 S. Ct. at 1552-57.

error and admit what we know to be true: [t]he *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[114] As an example of how these cases rest on racial stereotypes, Justice Gorsuch states that both "theories advanced by Justice White and Justice Brown" in the seminal *Insular Case, Downes v. Bidwell,* "rested on a view about the Nation's 'right' to acquire and exploit 'an unknown island, peopled with an uncivilized race … for commercial and strategic reasons'—a right that 'could not be practically exercised if the result would be to endow' full constitutional protections 'on those absolutely unfit to receive [them].'"[115]

Justice Gorsuch then provides that he is not alone in questioning the *Insular Cases*, their foundation, and their application; in doing so, quoting justices such as Chief Justice Fuller and Justice Harlan.[116] For instance, in *Downes v. Bidwell*, Justice Fuller indicated his dismay that Congress could "keep [a Territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[117] Justice Harlan likewise expressed his dismay of the Court "engraft[ing] upon our republican institutions a colonial system such as exists under monarchial governments."[118] Additionally, Justice Gorsuch provides that "Justice Harlan dismissed Justice White's supposed middle ground, which he could find nowhere in the Constitution's terms."[119] Justice Harlan states, in *Downes*, "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[120]

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[114] Id. at 1552.
[115] Id. at 1553.
[116] Id. at 1554.
[117] Id.; Downes, 182 U.S. at 372 (Chief Justice Fuller dissenting).
[118] Id.; Downes, 182 U.S. at 380 (Justice Harlan concurring in Chief Justice Fuller's dissent).
[119] Id.
[120] 21 S. Ct. at 391.

Justice Gorsuch further contends that the Court itself, not just individual justices, has come to have an issue with these cases; "[w]ith the passage of time, this Court has come to admit discomfort with the *Insular Cases*."[121] Instead of overruling the *Insular Cases* in light of their unworkability and "instead of confronting their errors directly, [Justice Gorsuch argues] this Court has devised a workaround."[122] As a workaround, he argues the Court employs "the specious logic of the *Insular Cases*" and "has proceeded to declare 'fundamental'—and thus applicable even to 'unincorporated' Territories—more of and more of the Constitution's guarantees."[123]

Highlighting the ambiguities created by these cases and the further inconsistency in the application thereof, Justice Gorsuch provides some of the questions created: "[w]hat provision of the Constitution could any judge rightly declare less than fundamental?"[124] Moreover, "[o]n what basis could any judge profess the right to draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry?"[125] He then provides a striking example of the inconsistency.[126] Despite the "right to jury trial remain[ing] insufficiently 'fundamental' to apply to some 3 million U.S. citizens in 'unincorporated' Puerto Rico," "the full panoply of constitutional rights apparently applies on the Palmyra Atoll, an uninhabited patch of land in the Pacific Ocean, because it represents our Nation's only remaining 'incorporated' Territory."[127] Aptly stated, Justice Gorsuch terms this "an implausible and embarrassing state of affairs."[128] This "implausible and

[121] Id. at 1555.
[122] Id.
[123] Id.
[124] Id.
[125] Id. at 1555-56.
[126] Id. at 1556.
[127] Id.
[128] Id.

embarrassing state of affairs" underscores the unworkability of these cases, featuring why their unworkability weighs in favor of them being overruled.[129]

D. Given the unprincipled and unintelligible development of the law created by the *Insular Cases*, like *Dobbs*, these cases, as well as the associated territorial incorporation doctrine, create a disruptive effect that counsels in favor of them being overturned.

The Court, in *Dobbs*, then proceeds to analyze its precedent for its "disruptive effect on other areas of the law" under the section, "*Effect on other areas of the law*."[130] The majority provides that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions."[131] Listing some of the effects the Court's prior abortion jurisprudence had, the Court states that the "cases have diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standard doctrine," "disregarded standard *res judicata* principles," "flouted the ordinary rules on the severability of unconstitutional provisions," and "distorted First Amendment doctrines." Most of all, the Court provides "[w]hen vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine 'has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure.'"[132]

"[L]ooking within the *Insular Cases*' four corners—as well as related decisions—leaves territorial incorporation as nothing less than the result of a 'very different legal backdrop."[133] As can be seen from the Justice Gorsuch's concurrence described in the above section, the doctrine has "failed to deliver the 'principled and intelligible' development of the law that *stare decisis*

[129] Id.
[130] Dobbs, 142 S. Ct. at 2265-76.
[131] Id. at 2275.
[132] Id. at 2275-76.
[133] Derieux & Alomar, supra note 1, at 765.

purports to secure'" through its interpretation and application being so unstable that the Court had to develop workarounds instead of continued development.[134] Arguably, there is nothing more unprincipled or unintelligible than "the continuing notion, embodied in the doctrine of territorial incorporation, that Congress can, on a whim, 'switch the Constitution on and off' in 'unincorporated territories."[135] Moreover, the disruptive effect of these cases is so virulent that, "since the 1950s, the Supreme Court has cabined the *Insular Cases* to their specific facts and holdings, warning [in *Reid v. Covert*] that the territorial incorporation framework was a 'very dangerous doctrine' that should not be given any 'further expansion.'"[136] Therefore, the engineered workarounds to the territorial incorporation doctrine and the *Insular Cases*, the unprincipled and unintelligible development of these cases and the surrounding law, and their overall disruptive effect, all counsel towards overruling the *Insular Cases*.[137]

E. The disfavored treatment of the *Insular Cases* by the Supreme Court, the lack of clear standards and application of the cases and associated doctrine, and the retention of broad territorial power in the absence of these cases, militate in favor of overturning them.

The final factor that the Court looked at in whether to overrule its precedents was whether overruling the precedent would "upend substantial reliance interests."[138] The Court found, in *Dobbs*, that overruling *Roe* and *Casey* would not upend these interests.[139] The Court stated that [t]raditional reliance interests arise 'where advance planning is most obviously a necessity.'"[140] In agreement with *Casey*, the Court found that "concrete reliance interest [were] not present here"

[134] Dobbs, 142 S. Ct. at 2275.
[135] Deriuex & Alomar, supra note 1, at 743.
[136] Id. at 766-67.
[137] Dobbs, 142 S. Ct. at 2275-76.
[138] Id. at 2276.
[139] Id. at 2276-78.
[140] Id. at 2276.

because "those traditional reliance interests were not implicated [since] getting an abortion is generally 'unplanned activity,' and reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'"[141] The Court also looked to "intangible form[s] of reliance."[142] Finding that the "Court is ill-equipped to assess 'generalized assertions about the national psyche," the Court did not find concrete reliance interests in the notion that "'people [had] organized intimate relationships and made choices that define their views of themselves and their places in society … in reliance on the availability of abortion in the event that contraception should fail' and that '[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives'"; the Court instead found that this notion of reliance "finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[143] The Court further noted that "[w]hen a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter."[144]

Here, whereas the territorial incorporation doctrine has governed for over a century, any reliance is misplaced due to it being treated "as an anomaly" by the Supreme Court for more than half of that time period.[145] Moreover, its lack of clear standards and inconsistent application also counsel against any form of tangible reliance.[146] Criticized avidly from the start, reliance on the reasoning these cases is also often misguided and misplaced.[147] Additionally, given the vast

[141] Id.
[142] Id.
[143] Id.
[144] Id. at 2277.
[145] Derieux & Alomar, supra note 1, at 767-68.
[146] Vaello Madero, 142 S. Ct. at 1552-57 (see J. Gorsuch's concurrence, generally).
[147] Id.

amount of power and broad authority given over territories, even in the absence of these cases, reliance is unfounded; "recent Supreme Court cases [such as *Sanchez Valle*, *Fitisemanu*, and *Vaello Madero*] have notably reaffirmed Congress' expansive powers over U.S. territories without mentioning the *Insular Cases*—or whether the territories at issue are 'unincorporated.'"[148] Thus, with the advent of the Court being unwilling to look into intangible reliance interests and the seeming scarcity of substantial tangible reliance to be upended here, the dearth of reliance also militates in favor of overturning the *Insular Cases*.[149]

F. The depreciated value of *stare decisis*, in conjunction with the strength of the five *Dobbs* factors weighing in favor of overturning them, mandates the *Insular Cases* being overruled once and for all.

Overall, the arguments for keeping these cases on the books are largely only those underlying the doctrine of *stare decisis*; Justice Powell provided these three primary reasons for why to adhere to *stare decisis*: "first, *stare decisis* makes the work of judges easier because courts need not reexamine the merits of every relevant precedent on each appeal; second, it enhances stability in the law by supporting a predictable set of rules on which to base behavior; and third, it supports public legitimacy of the decisions of the courts."[150] As demonstrated in the analysis of the above factors, these three reasons for adhering to precedent should serve as no barrier to overruling the *Insular Cases* in the face of *stare decisis*.[151] First, the continued application and

[148] Derieux & Alomar, supra note 1, at 769-770.
[149] Dobbs, 142 S. Ct. at 2276-77.
[150] C.J.S. Courts § 184 (2022) 1 Martin D. Carr & Anna Taylor Schwing, California Affirmative Defenses Expert Series § 14:62 (2d ed. 2022); See also Russell Rennie, A Qualified Defense Of The Insular Cases, N.Y.U. L. Rev. (2017) (setting forth an unusual argument in support of the Insular Cases; "this [n]ote argues that this accommodationist turn in Insular doctrine complicates the legacy of the cases—that their use to enable local peoples to govern themselves as they desire, and to protect their cultures, means the Insular doctrine is not merely defensible but perhaps even necessary, and finds support in arguments from political theory. Moreover, this [n]ote contends, such constitutional accommodation has a long pedigree in the American Constitutional system").
[151] Id.

adherence arguably makes the work of judges more difficult due to the cases' and doctrine's ambiguity and inconsistent use as well as the workarounds that have had to be created; it would likely be easier on the judges to reconsider and overrule the cases, then to continue to attempt to work with unworkable precedent.[152] Second, the lack of stability and the unpredictable inconsistency of these cases and the application thereof, tend to undermine the conceptual underpinnings of *stare decisis*.[153] Third, the Court would be hard-pressed to demonstrate public legitimacy in these decisions, given the workarounds it has had to create and given the overall imperialistic and racist undertones of the reasoning and foundation underlying the *Insular Cases*.[154]

Moreover, having deviated from *stare decisis* "145 times in cases requiring interpretation of the Constitution," the Court, especially in light of the treatment of *stare decisis* in *Dobbs*, should not fear doing so yet again, with the *Insular Cases*.[155] Noting the strikingly disingenuous nature of process arguments, Barone's law, named after political commentator Michael Barone, states that "all process arguments are insincere."[156]

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[152] See generally Derieux & Alomar, supra note 1; See generally Vaello Madero, 142 S. Ct. at 1552-57 (J. Gorsuch, concurring).
[153] Id.
[154] Id.
[155] Devin Dwyer, After Roe Ruling, Is 'Stare Decisis' Dead? How The Supreme Court's View of Precedent is Evolving, ABCNEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supremecourtview/story?id=84997047#:~:text=In%20thousands%20of%20rulings%20over,The%20overturning%20of%20Roe%20v.
[156] E-mail from Lance McMillian, Assoc. Prof., Atlanta's. John Marshall L. Sch., to Jacob Gregory, Exec. Legis. Ed., Atlanta's John Marshall L. Sch. (Oct. 3, 2022, 10:47 AM ET); Cf. Proceedings of the 42nd Canada-United States Law Institute Annual Conference: Back To The Future – The Canada-United States Relationship At A Cross-Roads, 43 Can.-U.S. L.J. 18, 120 (2019) (referring to Michael Barone as "the great U.S. political commentator" and quoting his rule that "all process objections are insincere" with approval); See also Michael Barone, All Process Arguments Are Insincere, WALL ST. J. (July 18, 2014, 3:20 PM), https://www.washingtonexaminer.com/all-process-arguments-are-insincere (Barone describing the circumstances that led to his creation of Barone's Law); Cf. Michael Watson, A Few "Laws" of Influence and Politics, CAP. RSCH. CTR. (Apr. 15, 2019), https://capitalresearch.org/article/a-few-laws-of-influence-and-politics/ (providing that "[e]ven fundamental constitutional questions are subject to the political 'Laws,' such as '"Barone's Law,' named for political demographer Michael Barone: 'All process arguments are insincere, including this one'").

> *Stare decisis* is a process argument. Under Barone's law, adherents to it are mostly insincere. When precedent supports the outcome that a judge wants to reach, judges are quick to invoke it. But the doctrine only rarely functions as an actual brake on judicial will, i.e. the Court would reach a totally different result but for following *stare decisis*, especially in the context of constitutional interpretation. Judges who complain about the Court not following *stare decisis* routinely disregard it in other cases, hence the insincerity. The malady is universal among Supreme Court justices.[157]

In a similar vein, the respect for *stare decisis* has depreciated for quite some time now, not just in recent treatment; more than 20 years ago, Justice Scalia "opined that 'the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.'"[158] The Court will often overrule its precedent when "judicial decisions [are] proven wrong in principle," "are unsuited to modern experience," and "which no longer adequately serve the interests of justice."[159] Essentially, "precedent may not be sufficient reason, in itself, to sustain a rule of law. Where justice demands, reason dictates, equality enjoins, and fair play decrees a change in judge-made law, courts will not lack in determination to establish that change."[160] Thereby, *stare decisis* should, "by no means," act as a "completely consistent or even [as] a strong barrier to revision."[161]

VI. Conclusion: The Case For The Long-Overdue End of The Insular Cases

With *stare decisis* at its weakest and the Court's recent jurisprudence weighing heavily in favor, the Court should finally overrule the *Insular Cases* and pull their "rotten foundation" right out from underneath them.[162] Using the five factors, the Court could step past the barrier and finally

[157] Id.
[158] Yavar Bathaee, Incompletely Theorized Agreements: An Unworkable Theory of Judicial Modesty, 34 Fordham Urb. L.J. 1457, 1466 (2007).
[159] 1 John J. Dvorske, John Kimpflen, & Karl Oakes, Standard Pennsylvania Practice 2d § 2:254 (2022).
[160] Id.
[161] Bathaee, supra note 136, at 1466.
[162] Vaello Madero, 142 S. Ct. at 1557.

get rid of a line of cases that have, "since [their] inception, contravened the Constitution, constitutional precedent, and long-established practice."[163] As succinctly provided by Justice Torruella, the *Insular Cases* "that allow this anachronistic system of governance to stand—particularly when applied against a community of 3.9 million U.S. citizens endowed with citizenship for nearly a century—should be soundly rejected by the same institution whose decisions have allowed this regime to exist for [over] one hundred and twelve years."[164]

Given the Court's recent strike at the doctrine of *stare decisis* and its blatant deviance therefrom in *Dobbs*, the stage is set for the unworkable, unprincipled, and unintelligible *Insular Cases* as well as the constitutionally foundationless, imperialistic territorial incorporation doctrine to be overturned.[165] A plethora of legal scholars, educators, and judges have analyzed and critiqued these cases as well as called for such overturning, despite the Supreme Court's former unwillingness to deviate from precedence.[166] Now, finally, precedence is seemingly no longer as strong a bar and the current Court appears prime for a somewhat ironic argument, that the

[163] Juan R. Torruella, Ruling America's Colonies: The Insular Cases, 32 Yale L. & Pol'y Rev. 57, 58, 94-95 (2013) (arguing not only that the "continued enforcement" of the territorial incorporation doctrine is "outdated" and "clearly contrary to a proper interpretation of the Constitution and the Law of the Land as expressed in the United States' treaty commitments," but also that the cases were "wrongly decided ab initio" and that "[t]he Constitution does not authorize the United States to hold territory or its citizens in such a condition").

[164] Id. at 59.

[165] See generally, Derieux & Alomar, supra note 1; see also, Dobbs, 142 S. Ct. 2228 (2022).

[166] Gerardo J. Cruz, The Insular Cases And The Broken Promise of Equal Citizenship: A Critique of U.S. Policy Toward Puerto Rico, 57 Rev. Der P.R. 27, 29 (2017) (providing that the "doctrine of the Insular Cases has been thoroughly analyzed and questioned in several academic publications"); See also, Natalie Gomez-Velez, What U.S. v. Vaello-Madero And The Insular Cases Can Teach About Anti-CRT Campaigns, 94 N.Y. St. B.J. 20, 21 (2022) (describing the Insular Cases as a set of cases that "deny the equal humanity of residents of Puerto Rico and other 'unincorporated' territories based on racist classifications of those residents" and providing that "[t]here is no mistaking the stark racist rationale behind the second-class status of the unincorporated territories that has led to the arbitrary and unequal treatment of their residents—notwithstanding their status as U.S. citizens." Furthermore, calling out these cases as being "at the core of a U.S. 'colonies problem' that must be addressed if U.S. constitutional commitments to equality and justice are to be met"); Cf. Joseph E. Sung, Redressing The Legal Stigmatization of American Samoans, 898 S. Cal. L. Rev. 1309, 1340 (2016) (critiquing the territorial incorporation doctrine in the context of its effects upon American Samoans); See also, Juan R. Torruella, Outstanding Constitutional And International Law Issues Raised By The United States-Puerto Rico Relationship, 100 Minn. L. Rev. Headnotes 79, 88 (2016) (arguing that the "colonial condition that caused Puerto Rico's present crisis" is "the direct result of the Insular Cases and the regime that they legalized" which "continues to dictate the fate of the Island and its inhabitants today").

dismantling of *stare decisis* in the Court's recent decision of *Dobbs* actually calls for a deviance from *stare decisis* in this instance. As stated, "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake."[167] It is time that the Court cure the line of mistakes that have taken away Sixth Amendment rights, created discrimination in extent of aid from federal programs, removed essential constitutional safeguards such as the Fifth Amendment right to presentment or indictment by a grand jury and the Sixth Amendment right to confront witnesses, held back the ability to vote for the President which governs these individuals, and has created an overall aftermath with innumerable lasting and continuous negative consequences in the everyday life of Puerto Rican, Phillipine, and other unincorporated territory residents alike, all due to distinction found nowhere in the Constitution.[168] For quite too long, all of these issues "'have been relegated to the back burners of judicial concern' and their doctrine 'floats in the penumbra of legal priorities considerably below the rule against perpetuities.'"[169] In light of over a century of negative development and heart-wrenching costs to millions of unincorporated territory residents, a lack of awareness should neither be acceptable nor tolerated.

The Court should act honorably, just like Justice Torruella, in advocating and creating change in this area and treatment of the law so that the "millions of Americans on islands, near and far, that are systematically forgotten and mistreated by our government," who "fight and die for our country, but have no right to vote for their Commander in Chief," "are subject to federal laws and regulations, but have no voice in their enactment," "have been characterized as 'savage,'

[167] Dobbs, at 2262.
[168] Serrano, supra note 10, at 411-12.
[169] Cruz, supra note 166, at 29 (reviewing the discussion in Gerald L. Neuman & Tomiko Brown-Nagin, Reconsidering The Insular Cases: The Past And Future Of The American Empire 60, 70 (2015) of Juan R. Torruella's keynote address—Juan R. Torruella, The Insular Cases: A Declaration Of Their Bankruptcy And My Harvard Pronouncement).

'half-civilized,' and 'ignorant and lawless'" by the Supreme Court yet "continue to strive peacefully for rights and recognition in our judicial system," and have been "the almost" Americans and "forgotten Americans of the unincorporated territories of the United States" will finally get the redress they deserve and the full citizenship owed to them by the United States which has left them in its shadows for far, far too long.[170]

[170] Tom C.W. Lin, Americans, Almost And Forgotten, 107 Calif. L. Rev. 1249, 1250-51 (2019).

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Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Boudouris, Kathryn
kboudouris@law.virginia.edu
434-924-2522
Marchand, Greg
gmarchand@usaid.gov
Sanchez, Camilo
csanchez@law.virginia.edu
(434) 924-7893

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary M. Griffith

2400 Arlington Blvd. Apt. #13, Charlottesville, VA 22903 • (402) 800–7637 • eqx7nk@virginia.edu

June 8, 2023

The Honorable Leslie Abrams Gardner
U.S. District Court for the Middle District of Georgia
201 West Broad Street
Albany, GA 31701

Dear Judge Abrams Gardner:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May of 2024.

As shown in my enclosed resume and transcript, I have made it a priority during law school to partake in opportunities that advance my research and writing skills. This includes enrolling in practical skills-based courses such as the International Human Rights Clinic and Advanced Legal Research. In addition, I have supplemented that knowledge with multiple internships spanning various legal fields, including administrative law, securities regulations, foreign aid regulations, and criminal appellate matters. I believe these experiences will allow me to contribute meaningfully to your chambers.

I have a particular passion for public service and plan to pursue a public interest legal career. This passion is evidenced by my experience serving as a Peace Corps Volunteer in Namibia from April 2018 – March 2020. Furthermore, in law school, I have sought out public interest internships and have been very fortunate to learn many different areas of law as an intern in various federal agencies. I have participated in multiple pro bono projects during my two years at UVA, totaling over 100 hours of pro bono legal work. A clerkship opportunity in your chambers would allow me to develop my legal skills further to be a better public servant and lawyer for the future communities I plan to serve.

Enclosed please find a copy of my resume, law school transcript, and a writing sample. You will also be receiving letters of recommendation from the following people.

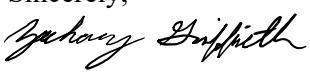
Professor Camilo Sánchez
Director, International Human Rights Law Clinic
434-924-7304

Ms. Kate Boudouris
Research, Instruction, and Outreach Librarian
434-924-2522

Mr. Greg Marchand
Assistant General Counsel / Acquisition & Assistance
U.S. Agency for International Development
202-215-3409

If you have any questions or need to contact me for any reason, please feel free to reach me at the above email address and telephone number. Thank you for your time and consideration.

Sincerely,



Zachary Griffith

Zachary M. Griffith

2400 Arlington Blvd. Apt. #13, Charlottesville, VA 22903 • (402) 800–7637 • eqx7nk@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, Virginia
J.D., Expected May 2024
- Program in Law and Public Service, Fellow
- Public Interest Law Association, Alternative Spring Break Finance Director
- William Minor Lile Moot Court Competition, Participant
- Pro Bono: Douglas County Attorney's Office; Legal Aid Justice Center; UVA Human Rights Clinic

University of Nebraska at Omaha, Omaha, Nebraska
B.S. in Business Administration (Accounting and Finance), *magna cum laude*, August 2015
- Susan Thompson Buffett Scholarship (merit-based full-tuition award)
- Study Abroad: Bendigo, Australia; Mumbai, India; and Istanbul, Turkey

EXPERIENCE

U.S. Department of State, Washington, D.C.
Legal Extern, Office of the Legal Adviser (L), Expected August 2023 – November 2023

U.S. Army, Fort Belvoir, Virginia
Legal Intern, Judge Advocate General's Corps, Government Appellate Division, June 2023 – Present
- Preparing appellate brief to be filed with the U.S. Army Court of Criminal Appeals

U.S. Agency for International Development, Washington, D.C.
Legal Intern, Office of the General Counsel, January 2023 – May 2023
- Researched and drafted legal memoranda related to U.S. foreign aid regulations
- Formulated bilateral agreement with foreign state

U.S. Securities and Exchange Commission, Washington, D.C.
Summer Scholars Program Intern, Office of the General Counsel, May 2022 – July 2022
- Reviewed rulemaking proposals and evaluated public comments
- Researched rulemaking authority granted to the Commission

Peace Corps, Silver Spring, Maryland and Okakarara, Namibia
Response Volunteer Coordinator, May 2021 – July 2021, Maryland
- Assisted Federal Emergency Management Agency in COVID-19 vaccine distribution efforts

Community Economic Development Volunteer, April 2018 – March 2020, Namibia
- Facilitated business skills and financial literacy trainings for unemployed youth (aged 18–35)
- Designed and implemented a leadership development program for a vocational training center's student representative council

AmpliFi, Omaha, Nebraska
Analyst, April 2020 – May 2021
- Built financial models and produced monthly reports for client executive management teams
- Provided *ad hoc* analysis reports for evolving business needs

Union Pacific Railroad, Omaha, Nebraska
Sales and Marketing Specialist, October 2017 – March 2018
- Managed construction products customers, totaling over $20 million in annual revenue

Senior Accounting Analyst, June 2017 – September 2017
- Authored and filed reports with the Securities and Exchange Commission (8-K, 10-Q, and 10-K)
- Prepared monthly consolidation procedures, budgets, and *ad hoc* analysis

Accounting Analyst, July 2015 – May 2017

PERSONAL

Interests: Golfing, hiking, experiencing new cultures, watching the NBA, and Notre Dame college football

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Zachary Griffith

Date: June 06, 2023
Record ID: eqx7nk

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	A-	Mitchell,Paul Gregory
LAW	6002	Contracts	4	B+	Johnston,Jason S
LAW	6003	Criminal Law	3	B	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B+	Armacost,Barbara Ellen
		SPRING 2022			
LAW	6001	Constitutional Law	4	B	Prakash,Saikrishna B
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	7088	Law and Public Service	3	B+	Kim,Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	B	Hynes,Richard M
		FALL 2022			
LAW	6106	Federal Income Tax	4	A	Yale,Ethan
LAW	9254	Human Rghts Study Project (YR)	1	CR	Sanchez Leon,Nelson Camilo
LAW	9182	International Law/Use of Force	3	A-	Deeks,Ashley
LAW	7067	National Security Law	3	B+	Deeks,Ashley
LAW	7071	Professional Responsibility	3	B+	Mitchell,Paul Gregory
		SPRING 2023			
LAW	8000	Advanced Legal Research	2	A-	Boudouris,Kathryn Lee
LAW	9255	Human Rghts Study Project (YR)	2	A-	Sanchez Leon,Nelson Camilo
LAW	6107	International Law	3	B+	Deeks,Ashley
LAW	8617	Interntl Human Rights Clinic	4	H	Sanchez Leon,Nelson Camilo
LAW	9114	Law of Armed Conflict	3	B+	Bill,Brian

UNIVERSITY of VIRGINIA
SCHOOL of LAW

Kathryn L. Boudouris
Research, Instruction & Outreach Librarian

June 9, 2023

The Honorable Leslie Abrams Gardner
C.B. King U.S. Courthouse
201 West Broad Avenue
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing on behalf of Zachary Griffith, who has applied for a clerkship in your chambers. Zach was my student in Advanced Legal Research in the spring of 2023. He is a terrific researcher and an even better colleague, and I could not be more pleased to recommend him for a clerkship.

Zach consistently demonstrated excellent research, writing, and analytical skills in my class. Over the course of the semester, he completed a number of exercises designed to simulate real-world research problems, including four memos based on sources such as case law, statutes, and legislative history. Zach's memos were always concise and well organized, and his reasoning was grounded in thorough, highly relevant research. Zach's last two assignments of the semester were particularly strong. In one of them, he analyzed interconnected statutes and regulations to assess their implications for certain business activities. Zach performed exceptionally detailed research, enabling him to present more accurate, definitive conclusions than most of his classmates. He also exceeded my expectations by finding agency guidance documents that enhanced his recommendations. In another memo, Zach evaluated a novel legal claim, providing a thoughtful synthesis of relevant case law and a nuanced analysis of the facts. I feel confident that Zach's research and writing abilities will serve him well as a clerk.

In addition to having great legal skills, Zach handles every project with resourcefulness and common sense. When faced with a complex legal problem, he is adept at identifying the key issues, developing a research strategy, and refining that strategy as his work progresses. He also excels at proposing creative solutions to clients' problems. Zach's adaptability and sound judgment will be great assets as his career progresses.

On a personal level, I have been deeply impressed by Zach's positive attitude, intellectual curiosity, and commitment to improving his skills. Zach has completed several internships and externships during his time in law school, embracing opportunities to solve real-world problems and refine his legal research skills. In discussing these experiences with Zach, I have been struck by his genuine enthusiasm for the work and his dedication to providing excellent support

580 Massie Road, Charlottesville, VA 22903-1738 | **P** 434.924.2522 | **E** kboudouris@law.virginia.edu
www.law.virginia.edu

to his supervisors. I always enjoyed his visits to my office hours, where I found him to be friendly, curious, and engaging.

I am confident that Zach's legal skills, exceptional attitude, and good character will make him an outstanding clerk. If you have any questions, please do not hesitate to contact me.

Sincerely,

Kathryn L. Boudouris
Research, Instruction & Outreach Librarian

580 Massie Road, Charlottesville, VA 22903-1738 | **P** 434.924.2522 | **E** kboudouris@law.virginia.edu
www.law.virginia.edu

Dear Judge,

This letter is to recommend Zachary Griffith provide Zach with my strongest recommendation

I have over twenty years of experience as an Judge Advocate, federal experience with legis decade as a supervisor, and, early in my care Honorable Judge Andrew Effron of the Court of the Assistant General Counsel for Acquisition International Development (USAID). During my of attorneys and close to twenty legal intern required to research and apply the law to fac communicate to a variety of audiences.

After having worked almost five months with M the finest future lawyers I have had the plea observe and review his analytical ability and consistently exceeded my expectations for jun confronts a wide range of complex questions f repeatedly demonstrated the superior intellec to analyze and resolve these issues. His exa regulatory problems that we face on a daily b concise writings, made him an integral part o

For example, in his first exposure to our gov esoteric question involving the requirements contracts. He quickly and ably learned the r precedents from federal courts and administra in a memo that answered the question so well sharing system. He did this repeatedly, on s agreements with partner governments to litiga grants. In so doing, he became a sought-afte within our office.

U.S. Agency for International Development
1300 Pennsylvania Avenue, NW
Washington, DC 20523
www.usaid.gov

On a personal level, Mr. Griffith was an enjo
in-person or in a virtual environment. He ea
colleagues, and distinguished himself with hi
significant prior experience, including two i
him obvious wisdom and maturity far beyond th
would thrive in almost any environment. I wo
return to USAID, and it is difficult for me t
judicial clerkship.

If you have any questions, please add @ usaid.gov
(202) 281-9620.

Sincerely,

Gregory A. Marchand
Assistant General Couns

June 09, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing with great enthusiasm to recommend Zachary Griffith for the position of Law Clerk. In my five years as Director of the International Human Rights Law Clinic at the University of Virginia, I have had the privilege of supervising over 100 students, and Zach stands out as being in the top 3%.

Zach is among the most committed to public service, bright, and responsible students I have encountered. He has taken two of my classes – a yearlong seminar on human rights research and the international human rights law clinic. This has allowed me to work closely with him in the classroom and on field trips to Mexico and Argentina for clinic project research.

Throughout these experiences, Zach has exhibited a responsible, committed approach, formidable time management skills, an analytical mind, and a strategic viewpoint. His maturity, a quality in part derived from his work in the Corps, helped not only in making our research successful but also influenced his peers, encouraging them to adopt professional demeanors similar to his own. Zach truly is a leader who leads by example.

Moreover, Zach's legal research skills are not only exceptional but also finely honed, demonstrating his capacity to handle intricate and multifaceted legal issues. One particularly impressive example of his research prowess was when he prepared a comprehensive and coherent legal memorandum on South African labor law, with a specific focus on the rights of agricultural workers. This was no small task, given the intricacies of South African labor law and the challenges inherent in understanding the unique struggles faced by agricultural workers. Zach's approach to this task was meticulous and thorough. He delved into various legal databases and sources, displaying a mastery of both domestic and international legal resources. His ability to extract critical information and apply the law to real-world scenarios was remarkable. The resultant memorandum was well-structured, providing a deep understanding of the subject matter, and served as an exemplar for the other teams in the clinic.

Further demonstrating his research acumen, Zach conducted a significant human rights research project focused on Germany's international obligations regarding violations committed on the African continent. This is a complex and niche area of international law, one that requires a nuanced understanding of international legal principles, human rights frameworks, and diplomatic relations. Zach rose to the challenge admirably, crafting an essay that was not only rich in detail but also cogent in its argumentation. His research unearthed powerful legal arguments and brought attention to a subject that, despite its significant legal implications, is often overlooked in global discourse.
With Zach's exceptional communication skills, outstanding time management, strong ethical commitment, keen attention to detail, brilliant analytical thinking, and strong research skills, I am confident he would be an excellent law clerk. Furthermore, Zach's straightforward, honest, and cordial demeanor makes him a pleasure to work with.

In conclusion, I wholeheartedly recommend Zach for the position of Law Clerk. He will undoubtedly prove to be a valuable asset to your chambers.

Please feel free to contact me if you need further information.

Sincerely,

Camilo Sanchez
Director, International Human Rights Law Clinic

Zachary M. Griffith

2400 Arlington Blvd. Apt. #13, Charlottesville, VA 22903 • (402) 800–7637 • eqx7nk@virginia.edu

WRITING SAMPLE

This writing sample is a memorandum I wrote for my second-year course, "Advanced Legal Research." The first page contains the writing prompt, followed by the legal memorandum addressing the fact pattern and research questions. This legal research assignment focused on statutory interpretation, federal agency rulemaking, and case law analysis. This writing sample is my own work product and has not been edited by any other person.

Writing Prompt – Advanced Legal Research

You're a solo practitioner in Charlottesville, Virginia, where you've developed a busy practice advising local businesses such as breweries, wineries, and tourism companies. One of your clients is Elon Effe, the sole proprietor of Blue Ridge Nature Photography ("BRNP"). Headquartered just outside of Shenandoah National Park, BRNP offers "photography tours," in which guides lead amateur photographers to scenic park locations and suggest techniques for producing better photos. Mr. Effe recently contacted you with questions about two aspects of his business operations.

The first set of questions has to do with BRNP's core business, photography tours. To date, BRNP has operated in Shenandoah National Park without the knowledge of the National Park Service ("NPS"); however, Mr. Effe recently learned that NPS requires tour operators to have a permit. He has asked for your help understanding the permitting process. Mr. Effe also wants to know more about the risks of getting caught if he were, hypothetically, to continue operating without a permit.

Second, Mr. Effe is planning a photo shoot in Shenandoah National Park to create ads for BRNP, and he wants to know if this activity also requires a permit. During the shoot, three local actors will pose for photographs using small props such as cameras and binoculars. Despite being relatively small in scale, the shoot will require lighting banks and a vehicle designed to support the use of expensive cameras and lighting equipment at remote sites. (The lighting banks and vehicle pose some risk of land disturbance at the shooting locations, but Mr. Effe assures you that (1) this risk can be mitigated using specialized grass protection mesh; and (2) any damage can be easily repaired.) When you last spoke, Mr. Effe was fairly irate about the possibility of paying for a permit; he argued that photography is free speech and should not be subject to permitting requirements.

Research the questions below and write a short memo to Mr. Effe.

1. The NPS website provides guidance regarding the permitting requirements for commercial uses of Shenandoah National Park, including photography tours. Use the website to answer the following questions:
   - What special conditions apply to permits for photography tours?
   - What fee will be charged for BRNP's permit application?
   - What additional documentation must be submitted with BRNP's application to conduct photography tours?

2. Identify the C.F.R. section that requires permits for commercial business activities, such as photography tours, in national parks. What is the maximum penalty for violating this section?

3. The C.F.R. contains regulations that address permitting requirements for certain types of filming and still photography in national parks. According to these regulations, does BRNP need a permit to conduct its photo shoot? Explain your analysis of the applicable regulations, including any relevant definitions.

4. For purposes of this question, assume that a permit is required for the photo shoot. As noted above, the lighting banks and vehicle that will be used in the photo shoot pose some risk of harm to vegetation. Is this risk likely to prevent the issuance of a permit? (You do not need to consider sources outside of the regulations when answering this question.)

5. As noted above, your client has raised First Amendment issues regarding permitting requirements for photography in the national parks.
   - Review the Final Rule that established permitting requirements for certain types of filming and photography in national parks. Did NPS consider the constitutionality of the regulations when they were established?
   - Has any court considered the constitutionality of the regulations under the First Amendment (with regard to either filming or photography)?
   - What will you tell your client about the prospects of a first amendment challenge to the permitting regulations?

TO: Elon Effe – Blue Ridge Nature Photography
ATTN: Kate Boudouris
FROM: Zach Griffith
DATE: March 19, 2023
RE: Photography Tour Permits – Shenandoah National Park

Federal regulations issued by the National Park Service (NPS) require Blue Ridge Nature Photography (BRNP) to obtain a commercial use authorization (CUA) to carry out its photography tour business in Shenandoah National Park. Failing to obtain a permit can result in a prison sentence of up to six months and a $5,000 fine.

To conduct a photo shoot for the purpose of promoting the BRNP business, using models, props, lighting banks, and a specially designed vehicle to support the camera equipment, requires a permit as well. Upon submitting the application, NPS will likely issue BRNP a permit to conduct the photo shoot, assuming the mitigating risks of environmental harm are accurate.

If BRNP were to challenge the constitutionality of the regulations relating to permits and fees associated with still photography in national parks, a court would likely rule in the government's favor using a "reasonable" standard.

The five sections below contain a more detailed analysis of the information listed above:

A) Shenandoah National Park CUA Requirements – Photography Tours

B) Penalties for Violating CUA Requirements

C) Required Permit for Still Photography in Shenandoah National Park

D) NPS Denial of Still Photography Permit

E) First Amendment Rights – Permit Requirements for Photography in National Parks

* * * * * * *

A) Shenandoah National Park CUA Requirements – Photography Tours

The National Park Service (NPS) requires permits for commercial uses of Shenandoah National Park.[1] In addition to the blanket requirements for all commercial use applications, special conditions apply to permits for photography tours. These special conditions read as follow:[2]

1. Photography tour guides will be responsible in ensuring that participants of tours and workshops will not willfully approach wildlife within 50 yards (150 feet), or any distance that disturbs or displaces any wildlife. In addition, feeding, touching, teasing, frightening, or intentionally disturbing wildlife is prohibited.
2. Collecting of plants, animals, or mineral specimens is prohibited.

A non-refundable fee of $315 must be included with the CUA permit application.[3] There are several forms and documents required for BRNP's CUA application, including:

- Guide Registration Form[4]
- Special Conditions for Guided Photography Tours and Workshops[5]
- Commercial Use Authorization Application (NPS Form 10-550), which lists further documentation requirements, including:[6]

[1] *Commercial Use Authorizations*, National Park Service (last updated Dec. 21, 2021), https://www.nps.gov/shen/learn/management/commercial-use-authorizations.htm.
[2] *Special Conditions for Guided Photography Tours and Workshops*, National Park Service (last visited Mar. 19, 2023), https://www.nps.gov/shen/learn/management/upload/Special-Conditions-for-Guided-Photography-Tours-and-Workshops.pdf.
[3] National Park Service, *supra* note 1.
[4] *Guide Registration Form*, National Park Service (last visited Mar. 19, 2023), https://www.nps.gov/shen/learn/management/upload/Guide-registration-form.pdf.
[5] National Park Service, *supra* note 2.
[6] *Commercial Use Authorization Application*, National Park Service. (last updated Nov. 2021), https://www.nps.gov/shen/learn/management/upload/2022_10-550_CUAApplication_508.pdf.

- Proof of liability insurance – Must have insurance rating on the certificate; if not on the certificate, the insurance broker must provide it in another document
- Proof of commercial auto liability insurance
- Additional required documentation specific to photography tours (Current Training Certifications):
  - 40-hour Basic First Aid
  - Wilderness First Responder (*Optional*)
  - Emergency Medical Technician (*Optional*)
  - Adult CPR
  - Leave No Trace

- If BRNP has clients sign an "acknowledgment of risk" form or "prerequisite of skills" form to participate in the photography tour, BRNP must provide the NPS Commercial Services office with a current copy. Thereafter, Shenandoah National Park must approve the form.[7]

B) <u>Penalties for Violating CUA Requirements</u>

If operating without a valid CUA in Shenandoah National Park, an individual could face a maximum prison sentence of up to 6 months, a maximum fine of $5,000, and be ordered to pay all judicial proceeding costs. The relevant statutory and regulatory provisions are discussed below.

[7] National Park Service, *supra* note 1.

36 C.F.R. §5.3 requires permits for commercial business activities, such as photography tours, in national parks.[8] A person convicted of violating this provision will be subject to criminal penalties under 18 U.S.C. 1865.[9] The statute reads as follows:

> **§1865. National Park Service** – (a) Violation of regulations relating to use and management of National Park System Units. A person that violates any regulation authorized by section 100751(a) of title 54 [54 USCS § 100751(a)] shall be imprisoned not more than 6 months, fined under this title, or both, and be adjudged to pay all cost of the proceedings.[10]

An offense that carries a maximum term of imprisonment of six months or less but more than thirty days is classified as a Class B misdemeanor.[11] If found guilty of a class B misdemeanor, a person could be fined not more than $5,000.[12]

C) <u>Required Permit for Still Photography in Shenandoah National Park</u>

Under the relevant C.F.R. regulations, BRNP will need a permit to conduct its photo shoot in Shenandoah National Park.[13]

Still photography in Shenandoah National Park requires a permit in two circumstances:[14]

1. [Still photography] uses a model, set, or prop as defined in § 5.12; or
2. The agency determines a permit is necessary because: (i) It takes place at a location where or when members of the public are not allowed; or (ii) The agency would incur

[8] 36 C.F.R. § 5.3 (2021).
[9] 36 C.F.R. § 1.3 (2021).
[10] 18 U.S.C.S. § 1865(a).
[11] 18 U.S.C.S. § 3559(a)(7).
[12] 18 U.S.C.C. § 3571(b)(6).
[13] 43 C.F.R. § 5.1 (2021). This subpart covers still photography activities on lands and waters administered by the National Park Service, which encompasses Shenandoah National Park.
[14] 43 C.F.R. § 5.2 (2021).

costs for providing on-site management and oversight to protect agency resources or minimize visitor use conflicts.

In Mr. Effe's planned photoshoot for advertising BRNP, he intends to use local actors, lighting banks, and a vehicle designed to support the use of expensive cameras and lighting equipment at remote sites. As noted above, these three things fall under the first circumstance requiring a still photography permit. Accordingly, the relevant definitions provided in § 5.12 are as follow:[15]

> ***Model*** means a person or object that serves as the subject for … still photography for the purpose of promoting the sale or use of a product or service. Models include, but are not limited to, individuals…placed on agency lands so that they may be filmed or photographed to promote the sale or use of a product or service… (emphasis added).
>
> ***Sets and props*** means items constructed or placed on agency lands to facilitate commercial filming or still photography including, but not limited to, backdrops, generators, microphones, stages, ***lighting banks***, camera tracks, ***vehicles specifically designed to accommodate camera or recording equipment***, rope, and pulley systems, and rigging for climbers and structures. Sets and props also include trained animals and inanimate objects, such as camping equipment, campfires, wagons, and so forth, when used to stage a specific scene... (emphasis added).

Under the above definitions, the models Mr. Effe intends to hire will be photographed to promote the sale or use of his BRNP service. Furthermore, the small props held by the actors

[15] 43 C.F.R. § 5.12 (2021).

(cameras and binoculars) will be used to stage a specific scene, likely to fall within the regulatory definition.

The lighting bank and specially designed vehicle to support the use of expensive cameras and lighting equipment, fall squarely within the definition of "sets and props," as defined above.

D) NPS Denial of Still Photography Permit

43 C.F.R. § 5.5 carves out specific instances where the NPS will deny a permit for still photography. The two most relevant instances pertaining to BRNP's photoshoot include determining if the activity is likely to "cause resource damage" or "result in unacceptable impacts or impairment to National Park Service resources or values.[16] The circumstances surrounding the BRNP photoshoot are analyzed further under each provision below.

Resource Damage

Resource damage is defined as "harm to the land or its natural or cultural resources that cannot reasonably be mitigated or reclaimed."[17] Mr. Effe concedes that the lighting banks and vehicle pose some risk to the land but reassures that this risk can be mitigated through grass protection mesh and that any damage can be easily repaired. Assuming that Mr. Effe can mitigate any potential resource damage and such damage can easily be repaired, NPS will likely grant Mr. Effe the necessary permit.

If the agency determines that the photoshoot would result in resource damage that could not be reasonably mitigated or reclaimed, NPS could impose certain conditions on the permit.[18]

[16] 43 C.F.R. § 5.5 (2021).
[17] 43 C.F.R. § 5.12.
[18] 43 C.F.R. § 5. 6

This would allow BRNP to conduct the photoshoot but under other conditions intended to "(1) protect the site's values, purposes, and resources, and public health and safety; and (2) prevent unreasonable disruption of the public's use and enjoyment."[19] Although the current circumstances of the BRNP photoshoot appear to comply with an acceptable permit, this is an alternative avenue that would allow BRNP to achieve its advertising goals.

Unacceptable Impacts or Impairment

There is some level of ambiguity with these terms, leaving the NPS broad discretion to determine if a particular still photography photoshoot would breach the *unacceptable impact or impairment* threshold. NPS has provided some internal guidance indicating that this threshold encompasses more than *resource damage*, factoring in additional interests, some of which include the national park's purposes or values and the safety of visitors and employees.[20] The internal guidance notes, "[v]irtually every form of human activity that takes place within a park has some degree of effect on park resources or values, but that does not mean the impact is unacceptable or that a particular use must be disallowed."[21]

When assessing the circumstances of the BRNP photoshoot, it is not likely to rise to the level of *unacceptable impacts or impairments*. A photoshoot is not outside the normal realm of park activities that visitors take part in daily. Although for commercial purposes, photographs promote the beauty of the national park, which can have a positive effect on conservation and preservation efforts, aligning with the very mission statement of NPS:

[19] 43 C.F.R. § 5. 6.
[20] *Management Policies 2006*, National Park Service, Sec. 1.4.7.1 (2006), https://www.nps.gov/subjects/policy/upload/MP_2006.pdf.
[21] *Id*.

> The National Park Service preserves unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations. The Park Service cooperates with partners to extend the benefits of natural and cultural resource conservation and outdoor recreation throughout this country and the world.[22]

As such, the BRNP photoshoot would likely not be considered to have *unacceptable impacts or impairments*, with NPS likely approving the permit application.

E) <u>First Amendment Rights – Permit Requirements for Photography in National Parks</u>

The NPS considered the constitutionality of the regulations when they established permitting requirements for photography in national parks. Specifically, they addressed public comments about free speech under the First Amendment.[23] In response to Comment 15, addressing free speech, the NPS stated:

> As intended by Congress, most still photographers will not be required to obtain a permit. However, Public Law 106-206 outlines several instances where a permit is either required or may be required by the agency, in recognition of the responsibility of the agencies to protect the resources entrusted to them. The permit ensures that the activity conforms to applicable laws and regulations through permit terms and conditions crafted to minimize damage to natural and cultural resources and disruption of other visitors, while remaining content neutral. This permit program is consistent with statutory as well as constitutional requirements.[24]

[22] *Our Mission*, National Park Service, (last visited Mar. 19, 2023), https://www.nps.gov/aboutus/index.htm.
[23] Commercial Filming and Similar Projects and Still Photography Activities, 78 Fed. Reg. 52,087, 52,090 (Aug. 8, 2013) (codified at 36 C.F.R. 5, 43 C.F.R. 5, 50 C.F.R. 27).
[24] Id. at 52, 090.

In one D.C. District Court case, Mr. Price (plaintiff) brought a facial constitutional challenge to regulations 43 C.F.R. Part 5 and 36 C.F.R. § 5.5.[25] The plaintiff filmed a portion of a road in York County, Virginia, for a film he released.[26] Two NPS officers found the plaintiff's film and issued him a citation for failing to obtain a commercial filming permit under 36 C.F.R. § 5.5(a).[27] The NPS decided to dismiss the charge against the plaintiff when he brought a constitutional challenge to the regulations.[28] After the criminal case was dismissed, the plaintiff filed a civil complaint with the court, bringing the same constitutional challenge.[29] The court applied a heightened level of scrutiny in assessing the regulations and found them to violate the First Amendment.[30]

The case was appealed to the D.C. Court of Appeals, where it was reversed and remanded.[31] The court found that the heightened level of scrutiny was the wrong standard of review, stating: "…although filmmaking is protected by the First Amendment, the specific speech-protective rules of a public forum apply only to communicative activity. Consequently, regulations governing filmmaking on government-controlled property need only be 'reasonable,' which the permit-and-fee requirements for commercial filmmaking on NPS land surely are."[32] The court indicated that the heightened-level of scrutiny intended for the traditional public forums does not apply to noncommunicative activity such as filmmaking on NPS land.[33]

[25] *Price v. Barr*, 514 F. Supp. 3d 171 (2021).
[26] *Id*. at 179.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 187.
[31] *Price v. Garland*, 45 F.4th 1059, 1075 (2022).
[32] *Id*.
[33] *Id*. at 1072.

One article in the Harvard Law Review scrutinized the court's decision, arguing that "policymakers should amend the statute regulating commercial filming on federal land to protect the public discourse made possible by the rise of cell phones and social media."[34] It is worried that the regulation "threatens content creators" and may "chill the creation of videos important to public discourse, including witness-bearing and activities videos."[35] It calls for an exemption for all "low-impact commercial filming" that is "unlikely to place an administrative burden on Park resources, harm public land, or interfere with the visitor experience."[36] Despite the criticism, the fees and permits outlined in the regulations remain constitutional and in effect today.

Although the case before the D.C. Circuit involved filmmaking activities, there is good reason to believe the same logic would extend to the permit requirement for still photography in the specific instances outlined in 43 C.F.R. § 5.2. As noted in the final rulemaking, Congress did not intend to require permits for most still photographers.[37] Instead, the regulation aims to protect the national parks by minimizing damage to the natural and cultural resources that heavy equipment and other props can harm. Although the court has not explicitly ruled on the constitutionality of the regulations pertaining to still photography, a court will likely find the regulations as "reasonable." Thus, bringing suit on behalf of BRNP, challenging the regulations' constitutionality would likely prove to be an expensive uphill battle. Given the relatively low cost of obtaining a permit, accompanied by the court's decision in *Price v. Garland*, BRNP's lowest risk option would be to comply with the regulations.

[34] *Recent Case: First Amendment Public Forum Analysis D.C. Circuit Holds that Filming in Public Forums is Subject to Lower Level of First Amendment Protection than Expressive Activities*., 136 Harv. L. Rev. 1252. (2023).
[35] *Id*. at 1256-1257.
[36] *Id*. at 1259.
[37] Supra, note 24.

Applicant Details

First Name	**Julius**
Last Name	**Hammond**
Citizenship Status	**U. S. Citizen**
Email Address	**julius.hammond@law.ua.edu**
Address	**Address** Street **1509 6th Ave E, Apt 103** City **Tuscaloosa** State/Territory **Alabama** Zip **35401** Country **United States**
Contact Phone Number	**3348067590**

Applicant Education

BA/BS From	**Auburn University**
Date of BA/BS	**December 2019**
JD/LLB From	**The University of Alabama School of Law** **http://www.law.ua.edu**
Date of JD/LLB	**June 2, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legal Profession**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Elliott, Heather
helliott@law.ua.edu
205-348-9965

Lopez, Albert
alopez@law.ua.edu
205-348-9831

Watson, Leila
lwatson@corywatson.com
2052717102

Mujumdar, Anil
amujumdar@law.ua.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am a rising third-year law student at The University of Alabama School of Law where I serve as a Senior Editor of the Journal of the Legal Profession. I am writing to express my interest in a term clerkship in your chambers for the term beginning in Fall 2024.

Since attending law school, I have had the opportunity to learn and grow in many areas. For two summers I have served as a summer associate for the law firm of Cory Watson Attorneys, where I assist with personal injury work primarily in the area of wrongful death cases. I have also served as a law clerk with the Tuscaloosa District Attorney's Office, where I assisted in research and trial preparation. I am passionate about client-centered representation, advocacy, and public service. Both of my parents have spent their careers working in the government and instilled in me early a motivation to serve my community. This passion has pushed me from initially focusing my talents on engineering to attending law school. I want to work in a field where I can use my gifts to make an impact on people's lives. Being able to clerk would allow me to also do this through the work that helps people through adjudication. The law is a governance tool, but it also is an avenue in which people can receive help for their lives where no other remedy would be possible.

During law school I have competed on one of the law school's trial advocacy teams and as a journal editor. These opportunities have honed my oral advocacy, research, and writing skills. Last year I founded the Tuscaloosa Civil Rights and Reconciliation Student Organization that focuses on legislation and its local effects. Additionally, I serve as a Student Ambassador for the law school and recently received the Dean's Community Service Award for my commitment to public service work.

I welcome the opportunity to speak with you further about my interest in serving your chambers. Please find attached my resume, transcript, writing samples, and letters of recommendation. Thank you for your consideration.

Sincerely,
Julius Hammond

J U L I U S A L L E N H A M M O N D

294 Private Road 1442, Daleville, AL 36322
julius.hammond@law.ua.edu | 334.806.7590

EDUCATION

The University of Alabama School of Law, Tuscaloosa, AL
Juris Doctor Candidate, May 2024

- *Journal of the Legal Profession*, Junior Editor, Vol. 47; Senior Editor, Vol. 48
- Tuscaloosa Civil Rights and Reconciliation, President
- Trial Advocacy Competition Team
- Academic Scholarship
- Patent Bar Eligible

Auburn University, Auburn, AL
Bachelor of Science in Industrial Engineering, December 2019

- **Honors:** Spade Honorary; Office of Inclusion and Diversity Outstanding Undergraduate Student; Alabama Power Academic Excellence Program; Samuel Ginn College of Engineering Dean's List
- **Activities:** Auburn University War Eagle Girls and Plainsmen; Alpha Phi Alpha Fraternity Incorporated, Omicron Kappa Chapter; Auburn University National Pan-Hellenic Council – President

EXPERIENCE

Cory Watson Attorneys, Birmingham, AL
Law Intern, May 2022 – June 2022; June 2023 – August 2023

- Research and prepare memoranda and any related materials to assist attorneys in preparation of civil litigation

Gregory Fann Turner, LLC, Birmingham, AL
Law Intern, May 2023 – June 2023

- Research and prepare memoranda and any related materials to assist attorneys in preparation of civil litigation

Tuscaloosa County District Attorney's Office, Tuscaloosa, AL
Law Intern, May 2022 – June 2022

- Research and prepare memoranda on various criminal law matters to assist attorneys in trial and hearing preparation.

Lockheed Martin Corporation, Troy, AL
Industrial Engineering Associate, December 2019 - June 2021

- Focused on manufacturing support and developing solutions to produce monetary savings for our program.
- Worked with a group of 35 peers to evaluate best practices for production teams.

ADTRAN, Huntsville, AL
Co-Op Engineer- Part-Time, January-May 2017; August-December 2017; May-August 2018

- Functioned as a hardware engineer on component replacement and aided the design of an SFP board.
- Worked as a User Experience Co-Op Engineer by focusing on the intranet design of the company to understand the UX process while helping increase efficiency through communication.

SKILLS

Legal Research, Statistics Comprehension, Coding, Simio, MiniTab

COMMUNITY SERVICE

Cornerstone Church Tutoring 2021 – present; Alpha Phi Alpha Fraternity, Incorporated, Pi Epsilon Lambda Chapter 2019 – present; Guatemala Missionary Trip 2019, Miami Missionary Trip 2015, New Orleans Missionary Trip 2018

INTERESTS

Akai MPC, Carter G. Woodson, Rubik's Cubes, Applied Mathematics, NBA Basketball

Academic Transcript

11546440 Julius A. Hammond
Jun 06, 2023 02:31 pm

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Name : Julius A. Hammond

Curriculum Information

Current Program:
Juris Doctor
College: Law School
Major and Department: Law, Law

This is NOT an Official Transcript

INSTITUTION CREDIT -Top-

Term: Fall 2021
Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	602	LW	Torts	C+	4.000	9.320	
LAW	603	LW	Criminal Law	C	4.000	8.000	
LAW	608	LW	Civil Procedure	B	4.000	12.000	
LAW	610	LW	Legal Research/Writing	B	2.000	6.000	
LAW	713	LW	Intro to Study of Law	P	1.000	0.000	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	35.320	2.523
Cumulative:	15.000	15.000	15.000	14.000	35.320	2.523

Term: Spring 2022
Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	600	LW	Contracts	B	4.000	12.000	
LAW	601	LW	Property	B+	4.000	13.320	
LAW	609	LW	Constitutional Law	B	4.000	12.000	
LAW	648	LW	Legal Research/Writing II	B	2.000	6.000	
LAW	742	LW	Legislation and Regulation	B-	2.000	5.340	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	48.660	3.041
Cumulative:	31.000	31.000	31.000	30.000	83.980	2.799

Term: Fall 2022

Major: Law

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	642	LW	Evidence	B	3.000	9.000	
LAW	667	LW	Conflict Of Laws	B	3.000	9.000	
LAW	753	LW	Racial Equity Audits in ESG	B	2.000	6.000	
LAW	772	LW	American Legal History	B+	3.000	9.990	
LAW	797	LW	Research	A	1.000	4.000	
LAW	797	LW	Research	A	1.000	4.000	
LAW	835	LW	Patent Law	B+	3.000	9.990	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	51.980	3.249
Cumulative:	47.000	47.000	47.000	46.000	135.960	2.956

Term: Spring 2023

Major: Law

Academic Standing: Standing Undetermined

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	644	LW	Decedents Estates Trusts Plan	B+	3.000	9.990	
LAW	660	LW	Legal Profession	B-	3.000	8.010	
LAW	669	LW	Introduction to Remedies	B+	2.000	6.660	
LAW	735	LW	Criml Procedure Pretrial	B	3.000	9.000	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	11.000	11.000	11.000	11.000	33.660	3.060
Cumulative:	58.000	58.000	58.000	57.000	169.620	2.976

TRANSCRIPT TOTALS (LAW) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	58.000	58.000	58.000	57.000	169.620	2.976
Total Transfer:	0.000	0.000	0.000	0.000	0.000	0.000
Overall:	58.000	58.000	58.000	57.000	169.620	2.976

COURSES IN PROGRESS **-Top-**

Term: Spring 2023

Major: Law

Subject	Course	Level	Title	Credit Hours
LAW	626	LW	BLSA TA Constance Baker Team	3.000
LAW	769	LW	Poverty Law	2.000

Term: Fall 2023

Major: Law

Subject	Course	Level	Title	Credit Hours

LAW	645	LW	Business Organizations	3.000
LAW	664	LW	Trial Advocacy: Civil	3.000
LAW	665	LW	Clinical Program	3.000
LAW	739	LW	Journl Of Legal Prof I	1.000
LAW	739	LW	Journl Of Legal Prof I	1.000
LAW	739	LW	Journl Of Legal Prof I	1.000
LAW	747	LW	Will Drafting	2.000

RELEASE: 8.7.1

June 12, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write in full support of Julius Hammond's application to serve in your chambers as a law clerk. Julius is self-motivated, diligent, and passionate about the law. I know he will be an asset to your chambers.

Julius was a student in Legislation & Regulation, a mandatory first-year course I teach on statutory and regulatory interpretation, in Spring 2022. His participation in class was excellent – he was always prepared when called upon and had insightful questions about the material will be a valuable participant in in-chambers discussions.

Like many law students with engineering and scientific backgrounds, Julius approaches law-school exams looking for correct answers, which limits the number of points he earns and skews his grades lower. He earned an A in his independent-study project with me, however, doing excellent research on a project regarding the politicization of the judiciary. I have no doubt that Julius possesses the research, writing, and analytical skills to excel as a law clerk.

Finally, I should note that Julius is a great person to be around. He takes law school very seriously, but he has a great sense of humor and a passion for justice. I understand well how important it is for law clerks to be great colleagues. When I clerked – for the late Justice Ruth Bader Ginsburg and for then-Judge Merrick Garland – my co-clerks were my most important day-to-day workmates. Had one of them been a dud, my work would have suffered. Julius will be not just a great law clerk, but a great co-clerk.

In sum, I fully support Julius Hammond's application for a clerkship in your chambers. Please do not hesitate to contact me if I can be of more assistance – my cell is 205-771-0007, and my email is helliott@law.ua.edu.

Yours sincerely,

Heather Elliott

June 12, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write to offer my strongest recommendation in support of Mr. Julius Hammond's application to become a judicial clerk in your chambers. As a student in my American Legal History and Decedents' Estates classes, I witnessed each of the skills that are essential for a successful judicial clerkship.

Throughout our two semesters together, Julius displayed the analytical, research, and writing skills that augur well for his performance as a judicial clerk. Beyond the classroom, Julius possesses a thoughtfulness, depth, and wit that infuses any environment with positive energy.

In American Legal History, students must submit four papers of varying lengths that explore student-selected topics. In his final paper, which examined the highly charged issue of voting rights in Alabama, Julius deployed his analytical abilities to produce one of the most persuasive pieces written by a member of the class. Julius capably wrestled with Alabama's complex voting rights history and identified legal theories to address racially drawn voting districts that have been absent throughout Alabama's jurisprudential history. More specifically, Julius argued for the application of originalist thought to counter racial redistricting, which he argued was an unconventional use of originalism in that it expanded rather than contracted rights. To that end, Julius's paper could be worked into a publishable piece because of the detailed historical description of the legal issues associated with the Court's recent decision regarding voting districts in Alabama. I hope to discuss publishing opportunities with Julius once school resumes in August.

Each of the four papers that Julius wrote for American Legal history demonstrated his commitment to comprehensive research. As a professor who undertakes a great deal of archival and non-archival research, I am fully aware of how difficult it is to locate legal and non-legal sources. While many, probably most, students seek readily available sources, the challenge of finding and subsequently acquiring materials outside of Tuscaloosa, Alabama, did not deter Julius's research efforts. To offer one example, Julius wrote one of his required papers on the nexus between live ordinance military training and environmental law in Hawaii. To examine the issue, Julius not only consulted traditional legal sources like cases and statutes, but also geological surveys and archeological information. Most students would hesitate to dive into geology and archaeology to explore a legal issue, but Julius was undeterred and embraced the opportunity to uncover new information and apply it to the law. To his credit, Julius found the sources for each of his papers without any guidance from me.

Julius's American Legal History papers were not only impressively researched, but also marshalled that research to make a cogent legal argument. American Legal History proved to be a highly competitive class because of the number of students with extensive journal experience. Nevertheless, Julius's writing ability favorably compared with the other students in American Legal History. As external verification of his writing abilities, Julius was a Junior and now a Senior Editor of our Journal of the Legal Profession, the nation's first journal devoted to an analysis of legal ethics and other problems confronting the profession. Julius's position on one of our most respected journals highlights his writing abilities. Julius's ability to incorporate historical information and modern sources into a substantive paper demonstrates a depth of thought and understanding that directly translates to the intellectual work of a judicial clerk.

Beyond his writing skills, Julius made four presentations to the class in American Legal History in which he explained why he chose a particular topic, discussed its historical significance, and offered his view on the issue. For example, Julius chose to write one of his papers about the trial of Zacarias Moussaoui, which had long been of interest to him because of his view of the trial's merits. Julius saw the Moussaoui trial as one involving an individual with a tangential connection to the terrorist attacks on 9/11 but the only one within the ambit of the American justice system, which spurred the threat of the death penalty. Julius's interpretation of the trial generated questions from other students in the class and Julius offered thoughtful and respectful answers in response.

In my doctrinal Decedents' Estates class during the most recently completed semester, Julius was always prepared for his quasi-Socratic interactions and willing to engage with the class materials. In fact, Julius would respond to general questions posed to the class when it would have been far easier to remain silent. I am always thankful to have students like Julius in my classes because student engagement is what propels a class – not my discussion of material. Students like Julius improve the law school classroom experience far beyond what I can do from behind the podium.

Outside of the classroom, I always enjoy chatting with Julius. Julius's family owns one of the oldest black-owned businesses in southern Alabama, a funeral home in Enterprise, Alabama. Although he apparently has no interest in becoming a mortician despite his science classes as an industrial engineering major at Auburn University, Julius has long been involved in the family business. In fact, I have asked him questions based upon his experiences on numerous occasions. While some of my requests were serious, such as the impact of burial expenses on estate planning, others were idiosyncratic, like the range of burial requests from traditional to non-traditional. Regardless of the nature of the question, Julius always offered a calibrated response to the question I posed. In short, interacting with Julius is enjoyable whether discussion is focused on Carter G. Woodson's role in the development of Black History Month, life as an undergraduate at Auburn, or the NBA Finals.

Albert Lopez - alopez@law.ua.edu - 205-348-9831

In conclusion, I extend my strongest recommendation in support of Julius's pursuit of a judicial clerkship. Julius is one of my favorite students in the next graduating class. I hope you will offer serious consideration to his application and if I can answer any questions that may arise, please do not hesitate to reach out to me. I will be happy to laud Julius's prospects as a judicial clerk if called upon to do so.

Sincerely,

Alberto Lopez
Professor of Law
University of Alabama School of Law

CORY WATSON
ATTORNEYS

Leila H. Watson
205-271-7102
205-324-7896 (fax)
Lwatson@corywatson.com

June 9, 2023

To the Selection Committee:

Julius Hammond worked directly under my supervision at Cory Watson the summer of 2022. Based on my daily interactions with him throughout his employment and continuing afterwards, I recommend Julius for a judicial clerkship.

As you know, Julius will be a first-generation lawyer from rural southeast Alabama. This seems to have encouraged him to seek all opportunities to discover what lawyers do, how the law is used by lawyers and judges, and how it impacts Alabama citizens. Our law clerks all work in one room during the summer to encourage collaboration. I doubt there was any assignment that went to the law clerk pool in which Julius failed to participate or at least inquire about the research and case. He is intelligent, respectful, and professional. He worked with our clients and was allowed to see all the file materials, and he never violated the attorney client privilege or the work product doctrine. When he got stuck, he knew it and he came for help. His writing and research were excellent and helpful to the lawyers. He is thorough in his research and factual investigation, exploring all possibilities for winning and for failure.

Perhaps the most important thing I can tell you about Julius is that he changed our view of law clerks. For many years, we have only hired rising 3L law students as summer clerks, with the belief that law students who have completed only one year of law school do not have the knowledge and skill requisite to capably handle our research assignments. A friend of the firm recommended that we hire Julius. I am certain there were times when Julius struggled with the assignments, but as lawyers, we all have struggled with tough issues and unknown laws. Just as we worked to learn the law and win the motions and resolve the cases, so did Julius. This year, when we did on-campus interviews, we invited a few rising 2L law students. And importantly, we asked Julius to return to work for Cory Watson again this summer because his work last year earned him the seat.

I believe that Julius Hammond understands the importance of the law, the role of lawyers and judges, the need for access to justice, and that the importance of predictability to govern must be weighed against the need for change. It is my opinion, that Julius Hammond will be a fine lawyer and will always use the power of the knowledge of law for good. I recommend Julius for a judicial clerkship.

If you wish additional information about Julius, please call me. He is returning to work for Cory Watson with the second group of clerks that starts after Independence Day. I am easy to reach at 205-271-7102 (direct dial) or Lwatson@corywatson.com.

Very truly yours,

LEILA H. WATSON

LHW/cfh

THE DISPLACEMENT OF POOR COMMUNITIES

I. INTRODUCTION

The United States Government has taking power which is derived from the Fifth Amendment.[1] This power allows the government to take private property and convert it into public use commonly known as eminent domain.[2] Takings can be either the physical seizure of the property or regulatory, such that it "restricts a person's use of their property to the point of it constituting a taking.[3] Eminent domain requires just compensation.[4] Through prior Supreme Court (SCOTUS) decisions, just compensation has been derived.[5] Eminent domain was implemented as a concept to help benefit the American people but has become a burden to certain demographics. The questions this paper presents to address are (1) how is eminent domain being used today and (2) does it have a disproportionate effect on communities stricken by poverty. This paper will first look at eminent domain from a historical perspective. Next, the focus will shift to how it has negatively impacted poorer communities and those without the ability to protect their property. Lastly, the paper will look at how these practices have an impact on wealth by examining how some families are being impacted today by the expansion of "public use" spaces.

II. HISTORICAL PERSPECTIVE

The practice of seizing property did not originate in the United States as the concept has been traced back to the era of the Magna Carta, in 1215 (cite).[6] Hugo Grotius, a Dutch jurist created the term "eminent domain" during the 17th century and the name was brought over to

[1] *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").
[2] *Id;* Cornell Law School, https://www.law.cornell.edu/wex/eminent_domain (last visited Jun. 2, 2023).
[3] Quimbee, Outline: Constitutional Law (2019).
[4] *Supra* note 1.
[5] United States v. Fuller, 409 U.S. 488 (1973).
[6] Bettersworth and Associates, Inc., https://bettersworthandassociates.com/2019/09/the-history-of-eminent-domain/ (Sep. 11, 2019).

America through governmental development and incorporated into the Constitution.[7] The policy's roots were founded upon the idea of benefiting the public, as the land would be used for civic use and to ensure the public's safety from environmental hazards (cite).[8] However, the Supreme Court first examined eminent domain in *Khol v. United States.*[9] The goal of the opinion written by Justice Strong was to establish the government's power to effectively be able to seize land for public use. The Supreme Court, twenty years later, put emphasis on the government's authority to condemn land when it issued its opinion in *United States v. Gettysburg Electric Railroad Company*.[10] Justice Peckham issues an opinion giving the term public use a broad range.[11]

> The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petitions is of that kind of public use for which the government of the United States is authorized to condemn land. It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.[12]

The main purposes of the early use of eminent domain were to establish parks and preservation of land with historical interest.[13] This changed though during the New Deal in order to help an economically disrupted United States.[14] This allowed the government to establish more national parks like Shenandoah, Mammoth Cave, and the Great Smokey

[7] *Supra* note 1.
[8] *Supra* note 6.
[9] *See* Kohl v. United States, 91 U.S. 367, 368 (1875) ("It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed").
[10] United States v. Gettysburg Electric Railroad Company
[11] *Id.*
[12] *Id.*
[13] The United States Department of Justice, https://www.justice.gov/enrd/history-federal-use-eminent-domain#:~:text=The%20U.S.%20Supreme%20Court%20first,house%20and%20post%20office%20building (Jan. 24, 2022).
[14] *Id.*

Mountains along with other acquisitions for land maintenance and historic preservation.[15] A major point of contention in the twenty-first century was the decision in *Kelo v. City of New London.*[16] The court here "used eminent domain to seize private property to facilitate a private development."[17] The decision broaden the government's taking power.

> This caused significant controversy, and states were quick to act to quell concerns about this expansion of power. In response to Kelo, many states have passed laws which have restricted governments' takings abilities (such as implementing a stricter definition of what constitutes a "public use," requiring heightened levels of scrutiny to justify an action categorized as a taking, etc).[18]

Currently, the *Kelo* decision has set the standard for the limitations of a taking. The limitations themselves are very broad but hinge on a state's definition of public use. For example, New York Law and Practice of Real Property gives illustrations of public use.[19]

> Taking of land for railroads, canals, turnpikes, ferries, sewers, gas companies, and the furnishing of electricity for illuminating purposes, and for the use of extensive street surface transportation, have been held to be for public uses. Similarly, the taking of all the wharves in a city for a uniform dock system, and the taking of lands to regulate the flow of rivers to protect health and safety, have been held to be public uses. A public park, an airport, a railroad station, a public parking garage, and modern housing for low-income families have been held to be public uses. [20]

These cases have set the standard for eminent domain in the twenty-first century. Dissenting, Justices O'Connor and Thomas in *Kelo* did provide some foreshadowing that came to fruition.[21] They predicted the harm the decision would have on communities with less power than the businesses seeking their property.[22]

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[15] *Id.*
[16] Kelo v. City of New London, 545 U.S. 469 (2005).
[17] *Supra* note 2.
[18] *Id.*
[19] § 31:10. Illustrations of "public use", 2 N.Y. Law & Practice of Real Property § 31:10 (2d ed.).
[20] *Id.*
[21] *Supra* note 16 at 494.
[22] *Id* at 494.

III. CONDEMNATION OF POOR COMMUNITIES

To understand the harm exacerbated by the *Kelo* decision, one must first understand what blight is and its history in eminent domain. The Supreme Court determined in *Berman v. Parker* that the elimination of blighted areas constitutes a public use by stating "We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums."[23] This langue combined with the broad definition of public use had a devastating impact on poor communities because "Too often, 'blight,' a facially neutral word, masked the discriminatory motives behind certain takings."[24] These takings were eventually coined as "urban renewal" but became so intertwined with the African American community that it was referred to by civil rights advocates as "Negro removal."[25] Ultimately, the *Berman* decision ended up having a devastating impact on these communities.[26]

> From 1949 to 1973, the federal government endorsed and financed an "urban renewal" program, which resulted in the takings of 2,500 communities in 993 cities across the U.S. Furthermore, scholars have argued that the concept of blight "was invented specifically for purposes of redoing aging downtown areas, and meant, quite simply, that buildings had lost their sparkle and their profit margin."[27]

This caused the displacement of many African American families. In some areas, there were significant taking such as in the District of Columbia where the government "was able to expel some 5,000 low-income blacks from their homes in the name of 'urban renewal.'"[28] This also

[23] Berman v. Parker, 348 U.S. 26 (1954).
[24] United States Commission on Civil Rights, *The Civil Rights Implications of Eminent Domain Abuse* (Jun. 2014).
[25] *Id.*
[26] *Id.*
[27] Jill M. Fraley, *Eminent Domain and Unfettered Discretion: Lessons from A History of U.S. Territorial Takings*, 126 Penn St. L. Rev. 609 (2022)
[28] *Supra* note 24.

did not only affect African American families but businesses as well.[29] This effect on businesses can disrupt communities and leave individuals without employment. This in turn created a housing crisis among these communities.[30]

> Cities took homes and generally replaced them with "businesses, educational and cultural institutions, and residences for middle-and upper-income people." By some counts, urban renewal programs replaced only about two percent of the housing they destroyed. According to research compiled by the U.S. Advisory Commission on Intergovernmental Relations in 1965, from 1949-1964, the use of eminent domain to promote urban renewal led to the demolition of 177,000 families' and 66,000 individuals' housing.

Furthermore, those displaced were often not compensated, and "Black families did not receive fair compensation for their homes until years later when lawsuits were filed across the country seeking fair payment."[31] The term "blight" allowed for the condemnation of poor communities and the displacement of thousands of people.

Blight and its broad definition created a prime opportunity for the *Kelo* decision.[32] Before examining its impact, it should be acknowledged how Justices O'Connor and Thomas foreshadowed its negative impacts in their dissent.[33] Justice O'Connor stated:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with

[29] *See Id* (Urban redevelopment did not just take homes; it took entire Black communities and Black business districts. Many examples of Black communities destroyed by urban renewal exist, including the Tremé neighborhood of New Orleans; the Hill in Pittsburgh;280 Northwest in Roanoke, Virginia; and Elmwood in Philadelphia).
[30] *Id.*
[31] *Id.*
[32] *Supra* note 24 (In 2005, the Supreme Court affirmed its broad interpretation of "public use" in Kelo v. City of New London. A divided (5-4) Court upheld the use of eminent domain by local governments to take individuals' private property and transfer it to others for the purpose of private economic redevelopment. It concluded that private economic development, similarly to the construction of roads, bridges, parks, public buildings, or other infrastructure, qualified as a permissible "public use.")
[33] *Supra* note 21.

> fewer resources to those with more. The Founders cannot have intended this perverse result.[34]

Justice Thomas expressed similar sentiments by stating that "allowing the government to take property solely for public purposes is bad enough but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities."[35] It is difficult to disagree with these two justices. It seems more often than not that the lack of wealth and the lack of access to wealth often puts poorer communities at a disadvantage. The *Kelo* decision definitely encouraged this conduct. It allows states to have a lot of discretion when determining blighted property. For example, in Kansas, a statute enacted in 2006 allows for blight condemnations over serious housing code violations.[36] The problem is "post-*Kelo* at least twenty-five states now set different standards for blight and non-blight/economic condemnations."[37] In 2007 research was done to show the disparate impact of eminent domain after the *Kelo* decision.[38] The research showed within two years of the decision project areas affected 58% of minority individuals while through the community as a whole it was 45% of individuals affected.[39] The percentages also were reflective of a nine percent difference among those who lived below the poverty line as well.[40] The percentage of affected individuals decreases with age and level of education as stated in the report "Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a

[34] *Supra* note 33 at 505.
[35] *Id.*
[36] David A. Dana, *Why the Blight Distinction in Post-Kelo Reform Does Matter*, 102 Nw. U.L. Rev. Colloquy 30 (2007).
[37] *Id.*
[38] Dick M. Carpenter II & John K. Ross, Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse (Jun. 2007).
[39] *Id.*
[40] *Id.*

significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%)."[41] This report summarized the impact by stating simply "taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on significantly less income, and significantly more of them live at or below the federal poverty line."[42] The serious issue that accompanies the discrepancies is the lack of substitute housing provided to those who are displaced.[43]

> Where (as in most states) Kelo-inspired reform would allow blight condemnation to continue more or less as before, at least in genuinely poor areas, there has been no legal movement to help ensure that households displaced by such condemnations are provided with better (or even as good) substitute housing. There has been no debate regarding measures that might ensure that the new blight-condemnation-facilitated development includes a substantial number of housing units for low-income households (whether those households had been displaced or not). Indeed, there has not, to my knowledge, been any coupling, even in proposals, let alone in enacted laws, of condemnation reform and funding for, or legal requirements designed to alleviate the shortage of, decent affordable housing in urban areas.[44]

Kelo's impact on poor communities should be examined and, in most cases, remedied. Blight and its broad definition should be revisited to provide for more stringent conditions in which poor areas should be condemned. These communities provide opportunities for those who live there to start businesses and help provide for each other in the form of community building. If the state government would provide ways in which there could be a form of

[41] *Id.*
[42] *Id.*
[43] David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 Nw. U. L. Rev. 365 (2007)
[44] *Id* at 378.

transfer for public use there could be major improvements in these communities. For example, in *Hawaii Housing Authority v. Midkiff*, the government liberally interpreted public use to redistribute wealth from seventy-two private lessors.[45] This "creative adjudication" should be able to apply to poor and low-income communities to provide some form of property transfer. The government could pay just compensation for a piece of property and then transfer said property to low-income individuals to help redistribute wealth as well as provide more economic opportunity to those in poor communities helping to reduce those in poverty. The liberal definition of blight and public use (especially for private use after the *Keto* decision) should be able to be examined in use in a manner as it had provided for the rich, but now the poor. This could help reshape the individuals who live in the community rather than displacing them and creating housing issues for those poor communities.

Justice Thomas spoke to the framer's intent in how they would not have wanted property to be taken from one party and given to another when he stated "The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B.'"[46] Justice O' Connor in her *Kelo* dissent also spoke to the intent of government condemnations and how the decision blurred the line between public and private stating "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process" and that "we give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the

[45] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
[46] *Supra* note 33 at 510.

public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."[47] It is important for our government to set a clear distinction between public and private use. As it stands, through *Berman, Kelo,* and *Midkiff* there exists a way in which public use could be used to benefit the poor the same way it is being used to benefit the rich. If the use of this authority is not mitigated by the government stepping in and defining blight and public use clearly as to it not being able to target minority communities, then those communities should be protected by having those who live in them be provided opportunities by redistribution through a taking similar to that of *Midkiff*.

IV. LAND'S IMPACT ON WEALTH

Land ownership or lack thereof undoubtedly has an impact on wealth. In order for eminent domain to take effect the must be land that can be acquired. Land is primarily kept in families through property disposition tools such as wills and trusts. For many poor communities, there is not any opportunity to leave their heirs land because there is no land ownership. Land ownership is generally in the hands of the few wealthiest individuals. This affects even if the land is lost as discussed by Blume and Rubinfield "if all parcels of land were owned by different individuals, each with little wealth, then the percentage reduction in the value of land would be closely related to the percentage loss of wealth." [48] This is not the case though and usually "a number of parcels are all held by a single wealthy investor" so, "then a substantial loss on one parcel of land is likely to involve a very small loss in terms of the overall wealth of the investor."[49] The takings suffered by poor and marginalized communities pose a major question. How do we rectify in 2023 the unjust enrichment the

[47] *Supra* note 33 at 494.
[48] Lawrence Blume & Daniel Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569 (1984)
[49] *Id.*

government or private business owners received from the taking of property by the government where in most cases those individuals did not receive just compensation? There is a major example being done in California, but this can be juxtaposed with the setback that can be seen from the expansion of Columbia University.

A. COLUMBIA UNIVERSITY

In 2010 the New York Court of Appeals held that Empire State Development Corporation (ESDC) could take land in Manhattanville by eminent domain to be sold to Columbia University.[50] Supporters of Columbia's expansion argued that it would bring economic development, jobs, and educational opportunities to the area. They believed that the university's presence would have positive long-term effects on the neighborhood and its residents, but "the taking indirectly displaced thousands of vulnerable residents and failed to create meaningful public benefits; though ESDC justified the taking as a means to eliminate urban blight, substantial evidence strongly indicated that its primary motivation was Columbia's private benefit."[51]

> Substantial evidence indicated the taking was primarily intended to benefit Columbia: Columbia created blighting factors, ESDC assisted in manufacturing a blight study at Columbia's behest, and ESDC sought to withhold important documents from the challengers during litigation, clearly indicating a conspiratorial relationship between ESDC and Columbia. Furthermore, the procedural protections for property owners seeking to bring public use challenges in New York are prone to abuse because the statutes governing eminent domain procedure do not allow trial-level review of such claims. Nevertheless, the New York Court of Appeals upheld the taking without even mentioning the heightened standard required by Kelo. By failing to apply heightened scrutiny, the court

[50] Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 724 (N.Y. 2010)
[51] Justin B. Kamen, *A Standardless Standard: How A Misapplication of Kelo Enabled Columbia University to Benefit from Eminent Domain Abuse,* 77 Brook. L. Rev. 1217 (2012).

> misapplied Kelo and enabled ESDC to abuse the power of eminent domain.[52]

This caused the displacement of many individuals at the benefit of a private institution. The "purpose" here was to eliminate blight.

> In Kaur, the New York Court of Appeals declined to address the mere pretext analysis demanded by Kelo despite well-founded allegations that the taking was motivated by a private purpose. There, ESDC purportedly sought to remediate blight in Manhattanville, a neighborhood on the Upper West Side of Manhattan, by transferring property to Columbia University.[53]

Columbia also contributed to the eminent domain abuse by creating factors that led the ESDC to determine blight was in the area.[54] "When ESDC considered developing the area in 2002, its Master Plan described no blight or blighted conditions in Manhattanville.183 No blight studies were conducted thereafter until 2006 when Columbia had already taken control of 'the very properties that would form the basis for a subsequent blight study.'"[55] This scenario again shows how the loose definition of blight allows institutions to take property and displace the individuals who live on those properties. Furthermore, "Columbia facilitated the degeneration of the neighborhood by failing to address water infiltration and building code violations, allowing tenants to violate local codes and ordinances, and maintaining garbage and debris in its properties for several years."[56] Not only was Columbia complicit in taking property from those who lack the financial ability to protect themselves, but the institution also contributed in practices to effectively assist the government agency in their determination of the communities being blight. This is a blatant example of abuse of power.

[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

Nathaniel Chiaravalloti gives some insight into how Columbia may have helped facilitate the takings over a period of time.

> Columbia University sought to justify the takings on the ground that an area is "blighted." Columbia University began purchasing land in the neighborhood in 2001, after which time, the University applied little to no maintenance to those properties. While that act in and of itself is fine, in this context it created significant questions about whether Columbia University was acting in bad faith. Specifically, by allowing the neighborhood to become blighted through years of willful neglect, it cast a pall over the proceedings when Columbia University's consultant (who happened to also be under contract with the City) determined the entire area to be "blighted" during the proceedings many years later. Among other things, tactics like willful neglect and sharing consultants, and their ultimate vindication in the courts, set forth a blueprint of how interested private entities might in the future use similar tactics to obtain land they seek.[57]

Columbia essentially helped facilitate the area to be considered blight. With this facilitation, it allowed them to gain more land through condemnation. There should be a case for citizens to challenge the action of private entities such as Columbia if they obtain land through eminent domain practices in such a manner as Columbia did. Columbia acted in bad faith and their taking of the property does not provide those from which the property was taken and displaced any sort of remedy. A possible remedy would be to provide those who lost their property back and allow them the option to sell at a fair market value to Columbia. The facts of the situation were ignored by the Court of Appeals so "instead of considering whether there was a public use, the Court of Appeals simply stated that removal of urban blight was a public purpose and that the records of the project site supported the ESDC's determination."[58]

[57]Nathaniel Chiaravalloti, *Grim Toll: A Case Commentary on Kaur v. New York State Urban Development Corp.,* https://www.jcred.org/shortreads/grim-toll-a-case-commentary-on-kaur-v-new-york-state-urban-development-corp (Oct. 18, 2013).
[58] Kaitlyn L. Piper, *New York's Fight over Blight: The Role of Economic Underutilization in Kaur*, 37 Fordham Urb. L.J. 1149 (2010)

Legislative changes are most likely necessary to curb eminent domain abuse and particularly New York was "one of the few states that did not pass legislation limiting economic development takings in response to the Kelo decision in 2005."[59] Therefore as Piper states in her article:

> [As a result,] There is no legislative basis for preventing courts from recognizing economic development as a public purpose. In order to provide greater protection of private property rights, common law protections must be supplemented by legislation. Although New York courts are free to interpret the New York Constitution as affording broader protection to individual rights and liberties than the federal Constitution, legislative reform would provide more consistent protection to property owners from eminent domain abuse.

The court had the opportunity to limit the definition of blight and it chose not to. Many states have passed statutes in response to *Kelo* but those statutes failed to close loopholes thus allowing takings through broad exemptions for blight condemnations.[60] Piper further elaborates on how New York should define blight by giving a restricted definition where blight is "property with the presence of buildings unfit for human habitation" that would have to meet such requirements as "fire hazards, safety hazards, defective or unusual titles, structures with utilities unfit for their intended use, vacant land with overgrowth or trash accumulation, a property that is a public or attractive nuisance, a property with health or safety code violations, tax delinquencies exceeding the value of the property, and environmental contamination."[61] This definition would only allow for buildings to be

[59] *Id.*
[60] *Supra* note 58 at 1191 (Many states that have passed legislative reform in response to Kelo failed to close loopholes allowing economic development takings through broad exemptions for blight condemnations.359 This essentially negates any prohibition on economic development takings because using economic underutilization as evidence of blight renders the blight requirement useless.360 Although passing legislation prohibiting economic development takings is a start, New York needs to go further by restricting the definition of blight. In order to do so, New York must define blight in a meaningful way).
[61] *Supra* note 58.

considered blight within specific circumstances. Buildings with minor building code violations could not be deemed blight. More restrictive definitions should be required by all states. This would help reduce the amount of property that could just be taken and have those who are poor so easily displaced. Piper then discusses how this occurred in New York due to the procedural requirement bar being low.

> New York may also want to consider adopting heightened procedural requirements for blight determinations. Some states have put significant procedural burdens on the government entity attempting to condemn a property for the stated purpose of eliminating blight. For example, in Colorado, an agency is required to show clear and convincing evidence that the taking is necessary to eliminate blight. A procedural burden like the one in Colorado could force New York state agencies to condemn properties only where the eradication of blight is the true purpose of the taking.[62]

There are multiple barriers that could have been put in place to keep Columbia and other predatory entities from exploiting those who are not wealthy. These communities must be prioritized though for these condemnations to not occur. The legislature has the ability to push for creative solutions such that people are not displaced from their homes for the sake of new business opportunities. The Supreme Court failed the poor communities of New York as Kamen simply puts "[s]uch a decision would have both defended the vulnerable populations harmed by the taking itself and settled the jurisdictional split regarding public use challenges to takings that are purportedly intended to remediate blight."[63]

B. LOS ANGELES

The city of Los Angeles and the Bruce family provides an opportunity to examine how the government may rectify instances of unjust takings.[64] Wilma and Charles Bruce migrated

[62] *Id.*
[63] *Supra* note 51 at 1246.
[64] Reparations for racial injustice Bruce's Beach taxation., 10/7/2021 SLTW

from New Mexico to what would later be known as Manhattan Beach, California in the early twentieth century.[65] Once there, they opened Bruce's Beach, also known as Bruce's Lodge, which came to be known as a historically significant beachfront property located in Manhattan Beach, California.[66] The area gained prominence as a popular resort destination for African Americans during an era marked by racial segregation.[67] In 1912, the Bruces purchased a parcel of land in Manhattan Beach and developed it into a beachfront resort known as Bruce's Lodge. It consisted of a bathhouse, a café, and other amenities. The resort attracted African American visitors from the surrounding areas who sought refuge from racial discrimination prevalent in other parts of the region. However, the presence of an African American-owned business and the influx of African American visitors to the beachfront property did not sit well with some of the local white residents where "guests were harassed by white neighbors and members of the Klu Klux Klan, who reportedly slashed the guests' tires and set fire to a mattress under the main building."[68] Over the years, there were repeated incidents of harassment and intimidation towards the Bruces and their guests, including acts of vandalism and racial slurs.[69] In 1924, the City of Manhattan Beach, under the pretext of wanting to use the land for public purposes, initiated condemnation proceedings against Bruce's Beach.[70] "The alleged reason was to build a park, but according to a report prepared by the city council, contemporary articles and historical documents indicate the real motive was that "white neighbors resented the resort's growing popularity and prosperity of its African American owners."[71] The condemnation was ultimately carried out, and the Bruces

[65] Dan Avery, *Pacific-Front Parcel Taken From Black Family in 1924 Returned to Rightful Owners*, https://www.architecturaldigest.com/story/manhattan-beach-black-family-dollar75million (Sep. 13, 2021).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

were forced to lose their property. They received nominal compensation ($14,500) for the seizure of their land.[72] The condemnation of Bruce's Beach was a clear example of racially motivated land seizure and discrimination against African Americans during a time when segregation laws were prevalent. It was an injustice that deeply affected the Bruce family, who lost their business and property due to racial prejudice.[73]

Years after the condemnation of the property activist, historians, and the family advocated for the return of the property which is worth at least $75 million.[74] It more recently captured the attention through the activism that encapsulated 2020.

> L.A. County board of supervisors member Janice Hahn became aware of the campaign last year, as the death of George Floyd fueled an overdue radical reckoning across the U.S. Hahn began looking into how to rectify a century-old wrong. "Bruce's Beach became a place where Black families traveled from far and wide to be able to enjoy the simple pleasure of a day at the beach," she said in April, when the council announced plans to return the land.
>
> "The Bruces had their California dream stolen from them," Hahn said. "And this was an injustice inflicted not just upon Willa and Charles Bruce but on generations of their descendants who almost certainly would have been millionaires if they had been able to keep this property and their successful business."[75]

Issued occurred though as the city was not able to transfer the property due to certain regulations.[76] The California state Senate eventually passed a bill allowing the transfer of the land back to the Bruce family.[77] The Bruce family eventually sold the land back to Los

[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

Angeles County for $20 million.[78] This provides a framework for a legal solution where those who are a part of marginalized communities can receive benefits from unjust takings.

The Bruce taking and the Columbia taking differ in a few ways. The Bruce taking was an early taking prior to the cases discussed in this paper. Bruce's Beach represents a historical example of racial injustice, reflecting broader patterns of discrimination and segregation in society. The condemnation of the property was part of a larger pattern of marginalization faced by African Americans. In the case of Bruce's Beach, the condemnation involved the seizure of private property from a specific family, the Bruces, who were African American entrepreneurs. It was a racially motivated action aimed at displacing them and their business. On the other hand, Columbia University's case refers to the expansion of the university's campus in the Manhattanville neighborhood of New York City. It involved the use of eminent domain to acquire multiple properties from various owners to facilitate the university's development plans. Bruce's Beach represents a historical example of racial injustice, reflecting broader patterns of discrimination and segregation in society. The condemnation of the property was part of a larger pattern of marginalization faced by African Americans. In contrast, while Columbia University's expansion has faced criticism for its impact on the community.

For there to be legislative change the government must first be able to recognize the benefits of returning land to those whose families from which the land was taken unjustly. It promotes restitution and justice. Returning the land is a step towards rectifying the historical injustice inflicted upon these families. It acknowledges the wrongful taking of their property and seeks to provide some measure of justice by returning what was unlawfully seized.

[78] Rebecca Ellis, *Family to sell Bruce's Beach property back to L.A. County for nearly $20 million*, https://www.latimes.com/california/story/2023-01-03/bruce-family-beach-la-county (Jan. 3, 2023, 6:56 PM).

Furthermore, it encourages governments to address intergenerational inequities. In many cases, the unjust condemnation of land has long-lasting impacts that extend across generations. Returning the land can help address intergenerational inequities and provide an opportunity for affected families to rebuild their lives and accumulate wealth through the ownership and utilization of the property.

It can stimulate economic empowerment in the poor and marginalized communities. The return of condemned land can have significant economic implications for poor families. It can provide a valuable asset that can be leveraged to generate income, create businesses, or provide housing. This can contribute to poverty alleviation and economic empowerment, allowing families to improve their financial circumstances and enhance their quality of life.

A potential outcome could be community revitalization. When condemned land is returned to poor families, it can contribute to community revitalization. These families may invest in the property, renovate existing structures, or develop new businesses, leading to economic growth, job creation, and the revitalization of the surrounding neighborhood.

It encourages our state governments to value preserving cultural heritage. In cases where condemned land holds cultural or historical significance to a particular community or marginalized group, returning the land helps preserve that heritage. It allows future generations to connect with their roots, learn from the past, and maintain a sense of identity and belonging.

Allowing these communities to receive land which was unjustly taken would help in promoting reconciliation. Returning condemned land acknowledges historical injustices and

can serve as a catalyst for healing and reconciliation. It demonstrates a commitment to addressing past wrongs and promotes understanding, dialogue, and unity within society.

V. CONCLUSION

Eminent domain, derived from the Fifth Amendment of the United States Constitution, has been a controversial power wielded by the government. Initially intended to benefit the American people by converting private property into public use, eminent domain has increasingly become a burden for certain demographics, particularly impoverished communities. This paper has examined eminent domain from a historical perspective, highlighting key Supreme Court decisions and the broadening of the government's power to seize land. The impact of eminent domain on poorer communities has been particularly significant. The concept of blight, which allows for the condemnation of property, has disproportionately affected these communities, leading to their displacement and the loss of homes and businesses. The *Kelo* decision, in particular, enabled the government to take property for private development, further exacerbating the negative effects on impoverished neighborhoods. Justices O'Connor and Thomas foresaw the potential harm caused by the *Kelo* decision, as it allowed those with more resources and influence, such as large corporations and development firms, to benefit at the expense of those with fewer resources. The lack of wealth and access to wealth often puts poorer communities at a disadvantage, and the *Kelo* decision amplified this disparity. Furthermore, the lack of substitute housing provided to those displaced further exacerbated the housing crisis within these communities.

To address these issues, there is a need for a reexamination of the definition of blight and public use, ensuring that poor areas are not unfairly targeted. Additionally, there should be

measures in place to provide better substitute housing for those displaced and to redistribute wealth within these communities. By utilizing the liberal interpretation of public use, similar to the approach in *Hawaii Housing Authority v. Midkiff*, it is possible to reshape these communities and provide economic opportunities for their residents. Furthermore, the impact of land ownership on wealth cannot be ignored. Land ownership is predominantly concentrated in the hands of a few wealthy individuals, while impoverished communities often lack the opportunity to pass down land to future generations. This perpetuates the wealth gap and adds to the injustice suffered by these communities when their properties are taken through eminent domain without proper compensation. In conclusion, eminent domain has been used as a tool that, in many cases, has unfairly impacted poorer communities. The *Kelo* decision and the broad definition of blight have further widened the disparity between the rich and the poor. To rectify these injustices, there is a need for clear definitions and guidelines regarding blight and public use, as well as efforts to redistribute wealth and provide better opportunities for impoverished communities. It is essential for the government to ensure that eminent domain is used in a just and equitable manner, benefiting all members of society.

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June 15, 2023

The Honorable District Judge Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
201 West Broad Avenue
Albany, GA 31701

Dear Judge Gardner,

I am interested in pursuing a two-year clerkship with your chambers for the 2024-2026 term, or any term soon thereafter. Currently, I serve as a Permanent Attorney Advisor for the Oakdale, Louisiana Immigration Court and the Executive Office for Immigration Review. I also previously served as a Permanent Attorney Advisor for the Houston, Texas Immigration Court. I originally entered duty through the prestigious Department of Justice's Attorney General's Honors Program.

My experience serving as a law clerk on both the state and federal levels make me an excellent candidate for this position. As an Attorney Advisor, I have dedicated countless hours towards learning federal immigration laws and federal jurisprudence, which has afforded me significant time to hone my interpretation and analysis skills and abilities. During this time, I have also dedicated my time to familiarizing myself with federal procedure while analyzing complex issues that appear before the court. My time in law school, where I successfully balanced and prioritized my time with research focused academic assignments, while also performing near the top of my class academically, has equally prepared me to successfully navigate through challenging assignments that I may face in this clerkship position with your chambers.

More importantly, what has most drawn me to apply for a clerkship in your chambers is the opportunity to clerk for a judge with a career as decorated as yours. I have admired reading about your successful career in private practice working for various prestigious law firms, as well as your public service career serving as an Assistant United States Attorney for the Northern District of Georgia. I also admired your subsequent appointment to serve on the federal bench as District Judge for the Middle District of Georgia. My interest in clerking for your chambers is motivated by my desire to gain further practical and legal experience with a federal district court, become an Assistant United States Attorney and prosecute various federal criminal offenses, and to develop a well-respected career with the federal government and in public service. Having the opportunity to serve as your law clerk and observe and learn from your guidance is an invaluable experience that I would be honored to have.

My resume, law school transcript, writing sample, and recommendations are submitted with this application. Thank you for taking the time to consider me as your next law clerk. I am happy to provide any additional information that you may require.

Respectfully,

Jimmie C. Herring, Jr.

Jimmie C. Herring, Jr., Esq.

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1712 South 10th Street, Monroe, LA 71202 * (318) 348-8103 * jimmie.herring14@gmail.com

EDUCATION

Southern University Law Center May 2019
Juris Doctor, *cum laude* (GPA 3.5, top 12 %)

Southern University Law Review, *Associate Editor*
Commercial Papers and Negotiable Instruments, *CALI Excellence for the Future Award*
Southern University Law Review Symposium on Immigration, *Co-Chair*
Board of Student Advisors, *Teaching Assistant*
Publication: Jimmie Herring, Jr., Note, *The Discrimination, Biased Implications, and Discretion of Prosecutorial Interpretation of Material Evidence in Trial: A Case Analysis of Turner v. United States*, 46 S.U.L. Rev. 105 (2018)

Louisiana State University May 2015
Masters in Public Administration

Southern University and Agricultural and Mechanical College May 2013
Bachelor of Arts in Political Science, *cum laude*

Honors Thesis: *The Controversy, Implications, and Purpose of Implementing Voter Identification Laws in the United States: An Underlying Means of Decreasing Minority Voting*

EXPERIENCE

Executive Office for Immigration Review, Houston, TX and Oakdale, LA
Permanent Attorney Advisor September 2022- Present

- Conducted legal research and analysis, as well as drafted judicial decisions on various federal immigration legal issues for a non-detained immigration court and a detained immigration court for federal immigration judges

Executive Office for Immigration Review, Oakdale, LA
Attorney Advisor September 2020–September 2022

- Conducted legal research and analysis, as well as drafted judicial decisions on various federal immigration legal issues for a detained immigration court and federal immigration judges as a part of the Department of Justice's selective and prestigious Attorney General's Honors Program

The Honorable Chief Judge Robert P. Waddell and Judge Charles G. Tutt, Judges for the First Judicial District Court, Shreveport, LA
Law Clerk August 2019–August 2020

- Drafted criminal post-conviction relief rulings, and conducted legal research and analysis on various criminal and family legal issues

The Honorable Chief Judge Shelly Dick, U.S. District Court Judge, Baton Rouge, LA
Judicial Extern August 2018–November 2018

- Conducted legal research and analysis, as well as drafted memoranda on various federal criminal and civil legal issues

Hammonds, Sills, Adkins & Guice, LLP, Monroe, LA
Summer Associate July 2018–August 2018

- Conducted legal research and analysis, as well as drafted briefs, motions, and memoranda for the partner and associate attorneys in the areas of education law, civil litigation defense, personal injury, federal litigation, government affairs, etc.

Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, New Orleans, LA
Summer Associate May 2018–July 2018

- Conducted legal research and analysis, as well as drafted briefs, motions, and memoranda for the partner and associate attorneys in the areas of family law, successions, insurance defense, labor and employment, premise liability defense, legal ethics and professional responsibility, etc.

The Honorable Judge Donald R. Johnson, Judge for the Nineteenth Judicial District Court,
Baton Rouge, LA
Judicial Extern January 2018–May 2018

- Conducted legal research and analysis, as well as drafted memoranda on various state civil court issues for the judge's upcoming civil court proceedings

The Law Office of Natalie Blackman, Baton Rouge, LA
Legal Intern January 2018–May 2018

- Conducted legal research and analysis, as well as drafted briefs, motions and memoranda for a prominent solo-practitioner attorney in the areas of labor and employment discrimination, criminal defense, and personal injury

East Baton Rouge Parish Office of the Public Defender, Baton Rouge, LA
Law Clerk August 2017–November 2017

- Conducted legal research and analysis, and prepared motions to assist supervising criminal defense attorneys representing indigent criminal defendants in criminal court proceedings

CenturyLink, Monroe, LA
Public Policy Intern May 2017–July 2017

- Drafted policy position papers, as well as conducted policy research in the areas of telecommunications, net-neutrality, Internet broadband, and crime data for a Fortune 500 company's public policy and advocacy agenda

INTERESTS

Volunteering with Phi Beta Sigma Fraternity, Inc. in various leadership roles and endeavors; amateur and recreational baseball player; reading about various topics in history and politics; volunteering and participating with various bar associations and organizations

SOUTHERN UNIVERSITY LAW CENTER
OFFICIAL RECORD -- OFFICE OF THE REGISTRAR

*Not valid without impression seal of SULC affixed, Registrar's signature and ** END OF TRANSCRIPT RECORD ** as final statement*

STUDENT NAME: Herring, Jimmie C.
STUDENT NO: 0
UNDERGRADUATE SCHOOL: SOUTHERN UNIVERSITY-BATON ROUG
SULC ADMISSION DATE: 8/8/2016

CURRENT STATUS: Graduated 5/18/2019
JD DEGREE AWARDED: 5/18/2019
HONORS: Cum Laude
RANK: 13 out of 108

****

********* S. U. L. C. COURSE WORK *********

****

Dept.	Course Number	Sec.	Course Title	Semester Hours	Grade	Earned Hours	Grad Credit	Grade Points	
****** Southern University ******									
************ Fall 2016 ************									
Law	421	5	LEGAL WRITING I	2.0	A-	2.0	2.0	7.50	
Law	407	3	Basic Civil Procedure	3.0	A	3.0	3.0	12.00	
Law	406	3	FAMILY LAW	3.0	C+	3.0	3.0	7.50	
Law	402	3	CONTRACTS	3.0	A-	3.0	3.0	11.25	
Law	400	3	TORTS I	3.0	A-	3.0	3.0	11.25	
Law	429	8	Lawyering Process I	2.0	P	2.0	0.0	0.00	
				16.0		**16.0**	**14.0**	**49.50**	
								TERM GPA =	**3.5357**
					CUM. HOURS =	**16.0**		**GPA =**	**3.5357**
****** Southern University ******									
************ Spring 2017 ************									
Law	416	9	Legal Research	2.0	B+	2.0	2.0	7.00	
Law	404	3	CRIMINAL LAW	3.0	A-	3.0	3.0	11.25	
Law	401	5	TORTS II	2.0	A-	2.0	2.0	7.50	
Law	422	1	LEGAL WRITING II	2.0	A	2.0	2.0	8.00	
Law	417	4	OBLIGATIONS	3.0	B+	3.0	3.0	10.50	
Law	415	3	CIVIL LAW PROPERTY	3.0	A-	3.0	3.0	11.25	
				15.0		**15.0**	**15.0**	**55.50**	
								TERM GPA =	**3.7000**
					CUM. HOURS =	**31.0**		**GPA =**	**3.6207**
****** Southern University ******									
************ Fall 2017 ************									
Law	502	2	EVIDENCE	3.0	B	3.0	3.0	9.00	
Law	410	1	Learning Citizenship I	3.0	A	3.0	3.0	12.00	
Law	643	1	LAW REVIEW WORKSHOP	1.0	P	1.0	0.0	0.00	
Law	636	1	CONSUMER LAW SEMINAR	2.0	A	2.0	2.0	8.00	
Law	523	2	PROFESSIONAL RESPONSIBILITY	2.0	A	2.0	2.0	8.00	
Law	504	2	LA CIVIL PROCEDURE I	3.0	B-	3.0	3.0	8.25	
Law	414	1	CONSTITUTIONAL LAW I	3.0	B+	3.0	3.0	10.50	
				17.0		**17.0**	**16.0**	**55.75**	
								TERM GPA =	**3.4844**
					CUM. HOURS =	**48.0**		**GPA =**	**3.5722**

Dept.	Course Number	Sec.	Course Title	Semester Hours	Grade	Earned Hours	Grad Credit	Grade Points	
****** Southern University ******									
************ Spring 2018 ************									
Law	599	1	SUCCESSIONS AND DONATIONS	3.0	C-	3.0	3.0	5.25	
Law	521A	2	Trial Advocacy	3.0	A	3.0	3.0	12.00	
Law	510	1	Learning Citizenship II	3.0	A	3.0	3.0	12.00	
Law	505	2	LA CIVIL PROCEDURE II	2.0	C	2.0	2.0	4.00	
Law	413	2	CONSTITUTIONAL LAW II	3.0	B	3.0	3.0	9.00	
Law	643	1	LAW REVIEW WORKSHOP	1.0	P	1.0	0.0	0.00	
Law	418	1	CRIMINAL PROCEDURE	3.0	A	3.0	3.0	12.00	
				18.0		**18.0**	**17.0**	**54.25**	
								TERM GPA =	**3.1912**
					CUM. HOURS =	**66.0**		**GPA =**	**3.4677**
****** Southern University ******									
************ Fall 2018 ************									
Law	905	1	Intellectual Property Law	3.0	B+	3.0	3.0	10.50	
Law	509	2	SALES AND LEASE	3.0	A-	3.0	3.0	11.25	
Law	642	1	CLINICAL EDUCATION I	3.0	A	3.0	3.0	12.00	
Law	790	5	STATUTORY ANALYSIS I	3.0	P	3.0	0.0	0.00	
Law	611	2	CONFLICT OF LAWS	3.0	A	3.0	3.0	12.00	
Law	515	3	COMMERCIAL PAPER	3.0	A	3.0	3.0	12.00	
				18.0		**18.0**	**15.0**	**57.75**	
								TERM GPA =	**3.8500**
					CUM. HOURS =	**84.0**		**GPA =**	**3.5422**
****** Southern University ******									
************ Spring 2019 ************									
Law	681	1	LEGISLATIVE LAW	2.0	A	2.0	2.0	8.00	
Law	601	1	FEDERAL JURISDICTION & PROCEDU	4.0	B-	4.0	4.0	11.00	
Law	629	1	ADVANCED FEDERAL PRACTICE	3.0	B+	3.0	3.0	10.50	
Law	519	2	Pre-Trial Litigation	2.0	W	0.0	0.0	0.00	
Law	512	3	Business Entities	4.0	A-	4.0	4.0	15.00	
Law	507	2	SECURITY DEVICES	3.0	B-	3.0	3.0	8.25	
				18.0		**16.0**	**16.0**	**52.75**	
								TERM GPA =	**3.2969**
					CUM. HOURS =	**100.0**		**GPA =**	**3.5000**

Dept.	Course Number	Sec.	Course Title	Semester Hours	Grade	Earned Hours	Grad Credit	Grade Points

GRADING SYSTEM
Effective August 2007

A (96 - 100 = 4.0 pts.)
A- (90 - 95 = 3.75 pts.)
B+ (87 - 89 = 3.5 pts.)
B (83 - 86 = 3.0 pts.)
B- (80 - 82 = 2.75 pts.)
C+ (77 - 79 = 2.5 pts.)
C (73 - 76) = 2 pts.)
C- (70 - 72) = 1.75 pts.)
D+ (67 - 69) = 1.5 pts.)
D (63 - 66) = 1.0 pts.)
D- (60 - 62) = .75 pts.)
F (below 60) =.00 pt.)

GRADING SYSTEM
Effective August 1991

A (90 - 100 = 4 pts.)
B+ (85 - 89 = 3.5 pts.)
B (80 - 84 = 3 pts.)
C+ (75 - 79 = 2.5 pts.)
C (70 - 74) = 2 pts.)
D+ (65 - 69) = 1.5 pts.)
D (60 - 64) = 1.0 pts.)
F (0 - 59) = 0 pt.)

OTHERS

P Passing
I Incomplete
W Withdrawal
WF Withdrawal failure

Southern University Law Center - Not an Official Transcript Without School Seal. Unless Specified, The Student is Entitled to Honorable Dismissal.

D'Andrea J. Lee — 7/14/2021

Director, Records and Registration — *Date*

**** END OF TRANSCRIPT RECORD ****

June 15, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

Jimmie Herring interned in the Policy and Law organization when I was the Vice President of Stratigic Advocacy for CenturyLink. He impressed me with his integrity, work ethic, and superb writing skills. He is diligent, thoughtful, and insightful, and I strongly recommend him for a Judicial Clerk position.

During his time reporting to me, Jimmie was responsible for assisting with advocacy on technology issues, such as net neutrality and rural broadband development. He approached the technology issues with a keen eye for the underlying legal issues as well as an understanding of the real world impacts.

Jimmie would be an asset to any organization.

Thanks,

Lisa Hensley Eckert, Sr Counsel, International Regulatory Attorney for Tata Communications.

Lisa Eckert - lisahensleyeckert@gmail.com - 303-947-6513

June 15, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

It is my pleasure to recommend Jimmie Herring for a clerkship in your chambers. He is an excellent candidate: Mr. Herring was one of the hardest working students I have ever taught, he has strong analytical skills, and he is dedicated to doing good and important work.

Mr. Herring was my student during his first year of law school, he was my Contracts teaching assistant, and I was the faculty advisor of his law review article. As a student, Mr. Herring had a clear sense of purpose. He was thoughtful and worked hard to be the best student he could be. His hard work paid off--Mr. Herring graduated with honors, and he earned may other academic honors and scholarships throughout his law school career.

As a teaching assistant, Mr. Herring worked with students who needed extra help understanding the substantive law and improving their analytical skills. The students who worked with him reported he was helpful and patient and he challenged them to become self-directed learners. Mr. Herring helped the students thrive, instead of simply survive, their first semester of law school. Mr. Herring has a way of bringing out the best in those around him.

Throughout his law school career, Mr. Herring demonstrated a strong commitment to public service. He was selected as a fellow with the Marshall Brennan Constitutional Literacy Project. In that capacity, Mr. Herring worked with high school students by teaching and modeling important civics lessons and by helping the students prepare of a national moot court competition. In addition, Mr. Herring was selected as a White House Competitiveness Scholar. He used these positions to help others in the school and community.

Mr. Herring is currently an Attorney Advisor for the Oakdale, Louisiana, Immigration Court. In that position, he has honed his analytical skills by researching and writing in the area of federal immigration law.

Mr. Herring would be an excellent clerk, and I strongly recommend him to you.

Sincerely,

Wendy Shea
Professor of Law | Assistant Director of Legal Writing
Mitchell Hamline School of Law
Saint Paul, Minnesota 55105

WRITING SAMPLE

Jimmie C. Herring, Jr., Esq.
1712 South 10th Street
Monroe, LA 71202
(318) 348-8103
jimmie.herring14@gmail.com

I completed this legal writing sample and immigration decision draft during my tenure as an Attorney Advisor and Judicial Law Clerk for the Department of Justice's Attorney General's Honors Program. This immigration decision draft pertains to an immigrant alien's Application for Cancellation of Removal for Certain Nonpermanent Residents, or also known as a Form 42B, where they challenge their charges and allegations of removability from the United States. The immigration decision uses legal analysis and reasoning based on case law and statutes under federal law and laws established through the United States Department of Justice. Certain information in this writing sample has been redacted due to confidentiality. I have received permission from my employer to use this immigration decision as a writing sample.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
	)	
[redacted]	)	**File No.:** [redacted]
	)	
Respondent	)	
_____	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Cancellation of Removal for Certain Nonpermanent Residents pursuant to §240A(b)(1) of the Act

Voluntary Departure pursuant to §240(B) of the Act

ON BEHALF OF RESPONDENT:
[redacted]

ON BEHALF OF THE DEPARTMENT:
[redacted]

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL & FACTUAL HISTORY

Respondent is a native and citizen of Mexico, who entered the United States at an unknown place and time and was not admitted or paroled after inspection by an immigration officer. On August 20, 2020, the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("Department") issued a Notice to Appear ("NTA") charging Respondent as removable pursuant to INA § 212(a)(6)(A)(i). *See* Exhibit 1.

At the October 7, 2020 hearing, Respondent, through counsel, admitted to the factual allegations contained in the NTA and conceded removability as charged under section 212(a)(6)(A)(i). Based on Respondent's admissions and the evidence submitted into the record, the Court found Respondent removable as charged. Respondent declined to designate a country of removal and the Court designated Mexico as the country of removal. Respondent indicated that he would seek cancellation of removal for certain nonpermanent residents, and voluntary departure in the alternative. The case was reset for the submission of Form 42B, Application for Cancellation of Removal for Certain Nonpermanent Residents.

On October 7, 2020, the Court received Respondent's application for relief. A hearing was scheduled for November 3, 2020. A hearing on the merits was held on November 3, 2020. Respondent testified as well as his domestic partner. The court now issues this decision addressing Respondent's applications for relief.

Respondent's Form 42B, application for cancellation of removal for nonpermanent residents and supporting documentation is contained in the record as Exhibits 3-5. Prior to admission of the application, Respondent was given an opportunity to make any necessary corrections and then swore or affirmed that the contents of the application were all true and correct to the best of his knowledge.

II. EVIDENCE PRESENTED

Pursuant to 8 CFR 1240.1(b) the Court has familiarized itself with the entire record and it is ready to adjudicate this case. The record contains Exhibits one (1) through five (5) and Respondent's testimony.

A. Documentary Evidence

Exhibit 1 Notice to Appear dated August 20, 2020 and personally served on respondent on that date.

Exhibit 2 Notice for Asylum Seekers about the filing Deadline for Asylum Applications

Exhibit 3 Respondent's application for 42B Cancellation of Removal for Certain Nonpermanent Residents received by the court on October 7, 2020

Exhibit 4 Respondent's EOIR 42B evidence to be submitted into the record received October 27, 2020

Exhibit 5 Respondent's witness list received October 27, 2020

There were no objections to any of the exhibits and all have been marked and filed in the record of proceedings. All admitted evidence identified has been considered in its entirety regardless of whether specifically mentioned in the text of this decision.

III. APPLICABLE LAW

A. Credibility

Section 240(c)(4)(C) of the Act considers the following factors in the assessment of an applicant's, or witness's, credibility: his or her demeanor, candor, and responsiveness; the inherent plausibility of his or her account; the consistency between his or her oral and written statements; the internal consistency of such statements; the consistency of such statements with other evidence of record; any inaccuracies or falsehoods in such statements; whether or not such inaccuracy, falsehood, or inconsistency goes to the heart of his or her claim; and any other relevant factor. *See* INA § 240(c)(4)(C). There is no presumption of credibility; however, if no adverse credibility

determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. *Id*.

B. Cancellation of Removal

To be eligible for cancellation of removal under INA § 240A(b), Respondent must establish he (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (2) has been a person of good moral character during such period; (3) has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3); and (4) establishes removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien admitted for lawful permanent residence. *See* INA § 240A(b)(1).

The ten (10) year period of good moral character is calculated backward from the date on which the final administrative decision is entered by the Immigration Judge or the Board. *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007); *Matter of Ortega-Cabrera,* 23 I. & N. Dec. 793, 797-798 (BIA 2005).). INA § 101(f) lists several classes of individuals for whom good moral character cannot be established if a Respondent falls into one of those classes during the ten (10) year period. The fact that any person is not within any of the foregoing classes shall not preclude a finding for other reasons such person is or was not of good moral character. Good moral character does not mean moral excellence or that it is not destroyed by a single lapse. *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 366 (BIA 1991).

To establish exceptional and extremely unusual hardship an applicant must demonstrate a qualifying relative would suffer hardship substantially different from or beyond, which would ordinarily be expected to result from the alien's deportation but need not show such hardship would be "unconscionable." The hardship must be beyond which was required in suspension of deportation cases. Hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola,* 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal- Aguinaga*, 23 I&N Dec. 56 (BIA 2001).

Factors to be considered in determining the level of hardship include the qualifying relative's age, health, length of residence in the United States, and family and community ties in the United States and abroad. *Matter of Monreal- Aguinaga*, 23 I&N Dec. at 63. A lower standard of living, diminished educational opportunities, poor economic conditions, and other adverse country conditions in the country of removal are also relevant factors, but will generally be insufficient, in and of themselves, to support a finding of exceptional and extremely unusual hardship. *Matter of Andazola*, 23 I&N Dec. 319, 323-24 (BIA 2002); *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 63. However, all hardship factors should be considered in the aggregate to determine whether the qualifying relative will suffer hardship that is exceptional and extremely unusual. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 64; *See generally Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001) (evaluating the hardship standard under the former suspension of deportation statute). All relevant factors, though not "exceptional or extremely unusual" when considered alone, must be considered in the aggregate in determining whether "exceptional and extremely unusual hardship" exists. *Matter of Monreal- Aguinaga*, 23 I&N Dec. at 64.

C. Post-Hearing Voluntary Departure

At the conclusion of proceedings under section 240, the Court may grant voluntary departure in lieu of removal for a period not to exceed sixty (60) days. INA § 240B(b). To establish eligibility, the alien must prove he or she:

> (1) has one (1) year of physical presence immediately preceding service of the NTA;
>
> (2) has good moral character for at least five (5) years immediately preceding the application for voluntary departure;
>
> (3) is not removable under sections 237(a)(2)(A)(iii) or 237(a)(4);
>
> (4) has the means to depart the United States and intends to do so;
>
> (5) must post a voluntary departure bond, in an amount that must be at least $500, within five (5) days of the voluntary departure order;
>
> (6) has not been previously permitted to so depart after having been found inadmissible under section 212(a)(6)(A)

See INA § 240B(b)(1), (b)(3), (c); 8 C.F.R. § 1240.26(c)(2)-(3).

The alien bears the burden to establish he or she is eligible for voluntary departure and merits a favorable exercise of discretion. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *see also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). To determine whether a favorable exercise of discretion is warranted, the Court must weigh the relevant adverse and positive factors.

IV. Summary of the Testimony

1. *Respondent's Testimony*

In addition to the evidence listed above, Respondent and his spouse testified in support of his application. That testimony is summarized here to the extent it is relevant to the Court's analysis.

Respondent entered the United States illegally at Yuma, Arizona on September 26, 2006. Respondent stated he has lived in Memphis, Tennessee since entering the United States. Respondent is not married but lives with the mother of his children. Respondent has two (2) United States citizen children. Respondent's daughter is [redacted] born [redacted]. Respondent's son is [redacted] born [redacted]. Prior to coming into ICE custody, Respondent lived with his children and their mother, [redacted], in Memphis, Tennessee. Respondent and [redacted] have been in a relationship since 2014 or 2015. [redacted] has a work permit and social security number.

Since arriving in the United States, Respondent stated he has worked various jobs like construction, factories, pipes, but mostly construction. Most recently, Respondent has worked in a framing company, named [redacted], doing sheetrock work. Respondent has worked for [redacted] since 2017. Respondent stated he makes approximately $600.00 a week working for [redacted]. Respondent stated that the work was consistent.

Respondent stated that he filed income taxes in the years 2007, 2008, 2009 and 2011, but stopped filing taxes when he was paid in cash. Respondent stated that he used false documents when he first came to the United States. He specifically stated that they let him borrow a number. He stated a friend got him the number so that he could work when he first came to the United States. Respondent stated he used an ITIN number to file taxes and not the Social Security number that he used to work. Respondent stated that he is now aware that he is supposed to file and pay taxes and that he intends to pay what he owes if he is released.

Respondent stated that he has been arrested about four times but is unsure as to how many times he was arrested. Respondent believes his first arrest was in 2013 and was for not having a driver's license. Respondent stated he was arrested and appeared before a judge and paid $1000.00 bond. Respondent stated he was arrested a month later for not having a driver's license. Respondent said there were other traffic stops but they did not result in an arrest. Respondent was arrested for driving under the influence on January 18, 2018 and was convicted on August 6, 2020. Respondent admits that he drinks alcohol but stated that he does not have an alcohol problem.

Respondent stated that his son, [redacted] has medical issues. Respondent stated that he speaks very little and that they have tried to get him therapy. Respondent stated that the doctors advised that this is abnormal and that [redacted] needs therapy. Respondent does not know what the exact diagnosis is and states that he was informed that his son needs speech therapy. Respondent stated that his son [redacted] has not started therapy.

Respondent stated that he does not think the children's mother, [redacted], is able to help with the speech issues because she now has to work. Respondent then stated that she works various hours that changes. [redacted] goes to work at 6:30 p.m. in the afternoon and gets off work at 5:00 or 6:00 a.m. the next morning. Respondent stated that when [redacted] works, the children are cared for by [redacted]. [redacted] and the children are currently living in the same house they shared with Respondent. Respondent stated that his children do not receive food stamps but they have medical insurance through the government.

Respondent stated that [redacted] has a sister and brother in the United States but they do not live in Memphis, Tennessee. Respondent stated that [redacted] siblings do not have legal status in the United States.

Respondent has a brother in the United States that is a United States citizen and he does not live nearby. Respondent has his parents and siblings in Mexico. Respondent stated that they work in Mexico. Respondent's father farms. Respondent's sisters also work but in different things. Respondent does not know if he would be able to obtain work in Mexico as he has been in the United States for fourteen (14) years and does not know what the situation is in Mexico. Respondent stated that his children would not accompany him to Mexico because he does not have

a house there and the economic situation is not good. Respondent said crime is high there and he does not think his children would go.

Respondent testified that he has a travel document to allow him to return to Mexico. Respondent has the money to pay his passage back to Mexico. Respondent stated he would work with ICE to arrange the travel and is willing and able to leave by the date set by the court.

On cross examination, Respondent stated that there have been times that he has been out of work for weeks or a month, but never more than a year. Respondent stated that he has always tried to save money but does not have any money in savings currently. Respondent claimed his sister, nieces and nephew on the taxes he filed in 2007, 2008, 2009 and 2011, and he stated that he claimed them because he was helping them and sending them money in Mexico. Respondent cannot recall how much he was sending them but then says it was $100.00 or $200.00 but not much. Respondent stated he was not providing them with 50% or more of their needs. Respondent stated that the sister and children live in Mexico and they are citizens of Mexico. Respondent filed for the child tax credit for dependents who are citizen of Mexico and live in Mexico and in which he stated he does not provide with 50% or more of their support. Respondent stated that when he filed his taxes he was asked if he wanted to help his family. Respondent stated he obtained the documents from his sister so that he could obtain an ITIN number for those people.

Respondent stated that he has never owed money to the Internal Revenue Service (I.R.S). However, Exhibit 4, page 27 is a letter from the I.R.S that states that Respondent owes $5,306.57. Respondent stated that he has not paid this money to the I.R.S. On cross examination, Respondent stated that he sends money to his father and sisters in Mexico.

Respondent stated that his wife, [redacted], currently works at the warehouse for [redacted] and works from the afternoon until the early morning. Respondent stated she normally works four (4) days a week. Respondent stated that [redacted] was working for [redacted] prior to Respondent coming into immigration custody.

On cross examination, Respondent stated that he thinks it is easier for [redacted] to speak in English than in Spanish. Respondent stated that he and his wife speak Spanish at the house, but that his son watches videos on the phone and learns some words in English. Respondent states that his son has trouble speaking both languages. Respondent stated he helps [redacted] with his speech in Spanish and in English. Respondent stated [redacted] did not speak much before he started school and they had hoped that going to school would help. Exhibit 4, page 11 evidences that [redacted] was evaluated on August 22, 2019. Respondent stated that he has not started therapy. [redacted] does not have any health problems other than his speech delay. Respondent stated that his daughter, [redacted] is in good health.

2. *Respondent's Wife Testimony*

Respondent called his domestic partner, [redacted] as a witness. [redacted] stated that she met Respondent in 2013 and they have two (2) children. They are not legally married. The children are [redacted], and [redacted].

[redacted] stated that Respondent has only been arrested one (1) time and it was for driving under the influence. She stated she started working at [redacted] in March but then says it was after he was detained in 2018. She stated she normally works forty (40) hours a week but sometimes thirty-eight (38) hours a week. [redacted] stated she works the night shift. She stated she now has to work more to be able to pay a sitter to watch after her children. She pays a sitter approximately $100 a week to watch her children. She makes approximately $400 after taxes a week. [redacted] stated that rent is $775.00 a month.

On cross-examination, [redacted] stated that she has to be with the children during the daytime and she works during the night. She stated she cannot change her shift to daytime hours at [redacted] because it would be difficult to change shifts. Additionally, [redacted] stated that she has people that she can trust to watch the children, but they may not be available during the daytime. She does not want to hire a babysitter or have someone watch them during the day due to having to pay more money. [redacted] stated that she leaves the children with the sitter at night to work.

[redacted] has not obtained speech therapy for [redacted] and stated that COVID-19 has caused delays. [redacted] then stated she had two (2) appointments set up but she did not take him because she was pregnant and then she had her daughter and was taking care of her. [redacted] stated that the children receive medical insurance from the government and food stamps in the amount of $500.00 per month. The children also receive meals from the school since the school is operating virtually.

[redacted] testified that Respondent is very helpful in the care of their son, [redacted]. [redacted] stated that Respondent is helpful in aiding and teaching [redacted] in his learning and development issues. [redacted] has been very sad and depressed since Respondent's absence and detention. [redacted] testified that Respondent comes from one of the most dangerous areas in Mexico. She stated that it would be hard to raise their children in that environment if they were to move to Mexico. [redacted] claims that there is a lack of medical care, therapy, and employment opportunities in Mexico. She stated that the children do not speak Spanish.

V. Analysis

A. Credibility

The Court has carefully considered all of the evidence submitted into the record. Respondent's testimony was credible as was that of the witnesses. Thus, the Court does not make an adverse credibility finding and will consider all of the Respondent's testimony and that of the witnesses. This finding does not necessarily lead to the conclusion that he met his burden of proof.

B. Continuous Physical Presence

As to continuous physical presence, both parties stipulated that Respondent had the requisite ten years in the United States for continuous physical presence.

Based on Respondent's testimony and the documentary evidence, the court finds that Respondent has established the requisite ten (10) years in the United States. As such, the only remaining issues are whether Respondent: (1) established good moral character for the requisite ten (10) year period; (2) has no criminal convictions under sections 212(a)(2), 237(a)(2), or